1103. c. 33

Jus Feciale Anglicanum: 2

OR, A

TREATISE

OF THE

LAWS of ENGLAND

RELATING TO

War and Rebellion:

With an ACCOUNT of the

Laws of Capitulations and Surrenders

AT

Mercy and Diſcretion:

To which is prefix'd an

EXPOSTULATORY PREFACE

To the Right Honourable the

Lord *PARKER,*

Lord Chief Juſtice of ENGLAND.

By SAMUEL BREWSTER, Eſq;

Nam jam tum illis Temporibus fortius boni pro libertate loquebantur quam pugnabant. Corn. Nepos.

The SECOND EDITION.

LONDON:

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BRITISH
MUSEUM

TO

Sir WILLIAM STAPLETON of *Greys-Court*,
in the County of *Oxford*, BARONET,
And
in ſeveral Succeſſive Parliaments
of *Great-Britain*
Knight of the Shire;
A Gentleman accompliſh'd
in his private Capacity,
And in the *Senate*
One of THE FEW,
Who are only influenc'd
by the Service of their Country:
The SECOND EDITION of this Treatiſe
is moſt humbly Dedicated;
Not for any notable Worth
in the *Thing preſented*,
And far leſs in the *Preſenter*,
But chiefly out of a grateful Perſonal Reſpect,
And an Ambition to appear,
At all Times,
For the Honour of his Friendſhip,
And the Indulgences of
Actually received Favours,

His Highly obliged Servant,

SAMUEL BREWSTER.

BRITISH MUSEUM

The Editor's PREFACE.

THE following Expoſtulatory Preface to the late Lord PARKER *is ſo full and copious, that there needs little more to be told the Gentle and Ingenuous Reader, than that the former Impreſſion was conducted into the World under a ſhort Advertiſement on a ſhort Warning. For tho' it was for ſome Years a finiſh'd* MS. *exactly as you now have it, nevertheleſs it wanted a laſt Reviſing, as the Author, my Father, aſſured me when with his laſt Breath he commanded me, to publiſh it immediately on his Death, rough as I ſhould find it; ſo unwilling was he to be laid in his Grave without the* Hope *of juſtifying himſelf, as* Man *to* Men! *But how willing and ready ſoever I was to fulfil that his earneſt Deſire and Injunction, I had ſo many Lets and Hindrances on the Anvil, that it would have been imprudent to* obey (*ſacred as they were to me*) ſuch Orders, *being at that Time* myſelf, *and others* with *and* againſt *me, in his Judicial Capacity**, Suitors

* This Lord was now advanced from being *Lord Chief Juſtice*, to the Title and Dignity of Earl of *Macclesfield*, and *Lord Chancellor* of the Kingdom, *&c.*

Suitors *to the* Noble Lord *to whom theſe Sheets are addreſs'd; Therefore, for me to have ſet forth a* Recapitulation *on the Behaviour of his Lordſhip, when he ſate Supreme in another* High Court, *might (as already is obſerved) have been deem'd a great Weakneſs.* † *But when* this Peer *fell under a Sentence of Judgment, pronounced againſt him by the Higheſt of our Tribunals,* That moſt Auguſt Aſſembly his Peers, *and by them for ever after removed from all Poſſibility of doing farther* Wrong and Diſſervice *to* any *the* loweſt *Individual, I no longer heſitated executing the Will of a* Dying Parent, *but handed to the Public this* his vindicating Off-ſpring; *and as became the Duty of an* Elder Son, *took care of this, his* Youngeſt Iſſue. *If, indeed, in the firſt Edition, I fondly ſuggeſted, that there were very few ſo learned or illiterate but might reap ſome* Benefit *and* Inſtruction *by the* Publication, *I can now faithfully aver, that, however*

† *N. B.* He was Tried by his PEERS, in 1725 and UNANIMOUSLY found Guilty of *High Crimes and Miſdemeanors* in the Execution of his Office, *viz.* 'Not regarding the Obligation of his Oath, or the Duty of his 'high and important Office, but entertaining wicked and 'corrupt Deſigns and Views, to raiſe and procure to himſelf exceſſive and exorbitant Gain and Profit, by divers '*unjuſt and oppreſſive Practices and Methods,*' therein mention'd, and proved upon him: For which he was *fined* 30000*l.* and committed to the Tower till Payment.

however this may or may not have Inſtructed *and* Benefited *ſuch, it has yet been received with a general Complacency, and long ſince hath had a Call for a Republication, from Strangers as well as Friends; which, I preſume, cannot be at a more ſuitable Hour, than the preſent Juncture, when there is no more the* Rumour *and the* Talk *only of* WAR, *but* WAR *itſelf, the Engagement of* Engliſh *Hearts and Hands, which have been always found equally Brave and Steady in the Service of their Country, and its Glory in Name and Fame. Of* this, *and of* theſe, *the enſuing Pages do both amply and ſuccinctly* Treat, *in the Courſe of the ſeveral* CHAPTERS, *according to the* CONTENTS *of them here following.*

CON-

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AN

AN

Expoſtulatory Preface

To the Right Honourable

The LORD *PARKER*,

(When Lord Chief Juſtice of *England*.)

My LORD,

THE following Treatiſe is, for the moſt part, compos'd out of ſuch ſhort Notes as I had prepar'd for the Defence of Brigadier *Mackintoſh*, upon an Indictment of High Treaſon; which were afterwards intended to be us'd at the Trial of his Brother *Duncan Mackintoſh*; and tho' your Lordſhip did diſdain to hear the *plain* Arguments I offer'd, yet I hope you will vouchſafe at your Leiſure to peruſe

what is (contrary to my first Intentions) obtruded into the World in a homely Dress.

I have not design'd it as any Reflection upon your Lordship's Administration, and have scarce made any Application to the Subject for which it was intended.

But since your Lordship was pleas'd to reproach me with *Ignorance* and *Impudence* for attempting what you thought *novel*, I am oblig'd, in my own Vindication, to lick this *Fœtus* into some Form, that the World too may judge of its Deformity.

And yet 'tis not so much design'd for my own Vindication, as for the Honour of that Profession, of which I am an *unworthy Member*; and perhaps your Lordship cannot have so *mean* an Opinion of me, as *I have* of myself. The Bar is now adorn'd with Gentlemen of great Abilities and Learning, much greater than I shall ever pretend to attain unto; but the Indignation that fell on my Head has reflected some Dishonour upon the Bar; and 'tis fit I should repair the Injury, and take the Disgrace, if there be any, wholly to myself.

The Civilians did anciently call *Advocates* by the Names of *Patrons* and *Tutors*, as those who are to protect and take care of the Persons and Causes of their Clients and Pupils: The Profession is honourable

in

in all Countries, therefore ought not to receive any Diminution from the Weakneſs of particular Members; nor is there any Reaſon, that the *loweſt* of that Rank ſhould be treated with *Ignominy* and *Scorn.*

In *France* ſo much Regard is had to the Profeſſors of Laws, that they *ſit cover'd* before the higheſt Court in the Kingdom, the Parliament of *Paris*; a Privilege not allow'd even to the Princes of the Blood; of which the Duke *de Maine* (but without Succeſs) complain'd to the late King, who was a great Encourager of Law and its Profeſſors. The Pleader, at the Entrance on his Diſcourſe, waves his Bonnet to the Court, and then puts it on again, and makes his *Harangue* without *Interruption* from the Judges; and your Lordſhip may ſee in the *Pladois de Monſieur de Maitre* and others, what Scope and Liberty is given to Pleaders in that Country: And the Orations of *Tully* (from which your Lordſhip derives ſome Part of your own Eloquence) are a full Teſtimony of the Freedom of Pleaders, among the *Romans.*

In *Scotland* the Advocates have like Liberty of uttering for their Clients, whatever they believe may be for their Advantage, and are not ty'd to the Rule which prevails in our Courts, not to anſwer after the Lord Advo-

Advocate has reply'd; but have full Liberty of urging all they think proper for their Client's Defence, without Interruption: The Lord Advocate ſums up the Evidence, and the Judges aſſiſt only in examining the Witneſſes, without any Reflections or Recapitulation to the Jury.

And tho' in *England* a different Method prevails, yet our Trials are not leſs ſolemn; and our Practice has uſually indulg'd great Liberty to Counſel in maintaining and ſupporting the Cauſe of their Clients.

'Tis true, the Defendant is abridg'd of rejoining (by the ſtrict Rule) to Mr. Attorney-General's Reply: But then this may be Cauſe of Impertinence in the Defendant's Counſel; for he is oblig'd not only to anſwer what has been at firſt open'd, but is left to *divine* what is likely to be reply'd, and, if ſkilful enough, muſt obviate thoſe Objections by proper Arguments.

Our Courts are always preſum'd to be tender in the Caſe of *Blood*; and the Court is ſuppos'd to be of *Counſel for the Priſoner*: And I do not apprehend that by the Statute which aſſigns the Priſoner the Benefit of Counſel, the Court is diſcharg'd of that ancient Truſt. And your Lordſhip had no Reaſon to tell my Client, you *ſhould have thought yourſelf oblig'd to be of Counſel for him*

him if he had not had Counſel; and yet at the ſame Time you put the poor *Delinquent* into an *Agony*, by telling him *his Counſel did not underſtand the firſt Principles of the Laws.*

Indeed, my Lord, I pretend not to be of the higheſt Claſs of Pleaders, and would have directed my Clients to have retain'd the moſt eminent of the Profeſſion in ſo nice a Matter, as that of defending Life; for I knew myſelf to be *impar Oneri:* But they told me that their Fellow Priſoners had offer'd themſelves to ſome of the moſt Learned at the Bar, but they declin'd the Office, for what Reaſon your Lordſhip may beſt judge.

And if my Clients were content to make Uſe of a *weak Guide* (when *no better* could be had) it would have very much become your Lordſhip's Candour, to have *aſſiſted the Counſel*, as well as the *Priſoner*, and improv'd his *crude* Arguments into a *ſolid Defence.*

Thoſe that daily attend your Adminiſtration of Juſtice, know that you can do this with great Dexterity and Advantage, where *juſt Cauſes* are weakly defended. I have known your Lordſhip's Patience much commended in the Trials of *Criminals*; and I myſelf have taken frequent Occaſions to vindi-

vindicate the Equanimity of your *Temper*: For I am verily perſuaded, when you are oblig'd to any Act of Severity, great Violence is done to your natural Inclinations.

I was ſo cautious of giving Offence to the Court, that I uſher'd in the Defence I was making, with an Apology for my own *Weakneſs*, and that as I intended to expreſs myſelf with great *Freedom*, ſo I propos'd to do it with great *Plainneſs*: And leſt I ſhould utter any thing unbecoming my Function, or the Duty I ow'd to the Court, I beſpoke your Lordſhip's Candour to put the moſt favourable Conſtruction upon my Words; and then reminded your Lordſhip of the Equity of your learned Predeceſſor the Lord Chief Juſtice *Holt*, in allowing the ſame Privilege to a Priſoner's Counſel, which is allow'd in Civil Actions, where we are indulg'd the Liberty of doing the *beſt for our Clients*. Norwood Tryal.

I am ſo ſenſible of my own Defects in the Art of Oratory, that I pretend not to the Eloquence of a *Cicero* or a *Cowper*; for I know that my Manners are unpoliſh'd, and my Speech is uncouth: But as the Deformity of a Man's Body is not to be imputed as a Crime, ſo the natural Roughneſs of Man's Temper, is to be accounted rather his Infelicity than his Fault.

There-

Therefore I attempted the Defence of my Client's Cauſe from *plain* Arguments drawn from the *Laws of God*, from the *Laws of Nations*, and from the *Laws of England*; and I told your Lordſhip, that I had great Reaſon to inſiſt on the Laws of God, becauſe my Client had put himſelf upon his Trial by *God* and his Country.

But, pray (my Lord) why ſhould the Mention of the *Laws of God* appear *ridiculous* to a Court of Juſtice, when our Law holds for a Maxim, that Laws made contrary to the Laws of God are void, and has appointed ſuch Solemnity and *appeal to God* in every Circumſtance of a Trial?

For firſt, The Judges are *ſworn* to do equal impartial Right to every Man, even tho' they ſhould have any Letter, Meſſages or Commands to the contrary from the *King himſelf*: And the Law provides, that if *Great Men* interpoſe, and give any ſuch Commands or Direction, the Judge ſhall certify the King or his Counſel of ſuch Commands, in order to have them puniſh'd; ſo that the Subject is ſure to be try'd before juſt and impartial Judges, without the Interpoſition of the *King* or his *Miniſters*. 18 Ed. 3. c. 8. 20 Ed. 3. c. 2.

Secondly, The Grand Jury, who are to make the firſt Steps towards a Proſecution, and

and without whoſe previous Conſent no Proſecution is to be had, are all *ſolemnly ſworn* to preſent no Man out of Hatred or Ill-will, and to make juſt and honeſt Preſentments.

Thirdly, The Petit-Juries are not admitted to be *Judges*, without firſt taking a like *ſolemn Oath* to proceed according to the Evidence.

And *laſtly*, the Witneſſes are not allow'd to give Evidence, 'till they have enter'd into the like Caution, to *ſpeak the Truth, the whole Truth, and nothing but the Truth.*

Add to this, that the Clerk of the Arraigns, upon joining Iſſue with the Priſoner, prays that *God would ſend him a good Deliverance.*

And certainly 'tis proper at all Times to urge the Laws of God as the Rule and Foundation of Juſtice. For as the Laws of God are the Original of all Laws, ſo 'tis not difficult to trace the beſt of our Laws from that *divine Fountain.* The learned *Selden* is of Opinion, that we derive our Laws from the *Roman* Imperial Conſtitutions: We know that the *Romans* receiv'd them from the *Greeks*, and they again from the *Jews*: But I rather think we did receive our Laws from the immediate Book of God; for whoever reads the Laws of

King

King *Ina* will find, that he did deliver them in the Words of *Moſes*. Therefore I have always advis'd ſuch young Gentlemen as have requir'd my Aſſiſtance in the Direction of their Studies, to lay their Foundation in the *Magna Charta*, given by God to his own People. And I believe whoever carefully compares our Laws with the Laws there deliver'd, will find, that whatever of our Laws do contradict the Laws there laid down, are far from anſwering the End and Intention of the Law-makers.

I am the more confirm'd in this Opinion, by what I find deliver'd by the Author *De Antiquitate Britannicæ Eccleſiæ* (commonly aſcrib'd to Archbiſhop *Parker*, but ſuppos'd, by Primate *Uſher*, to be written by *Jocelin* his Chaplain) That *Lucius* the firſt Chriſtian King of this Iſland, ſoon after his Converſion to Chriſtianity, ſent an Embaſſy to *Eleutherius* Biſhop of *Rome*, requiring him to ſend a Tranſcript of the *Roman* Laws, for eſtabliſhing the Government of his Kingdom: But the good Biſhop ſent him Word, that the *Roman* Imperial Laws were not neceſſary for a Chriſtian Commonwealth, and that the ſame did contain many Things not fit for a Chriſtian State to follow; and that he needed no

Page 5. of the *Hanaw* Edit. A. D. 1605.

Help in the framing of Laws, ſince he had both the Old and New Teſtament, out of which, by the Help of his Counſel, he might compoſe a wholeſome Body of Law. The Pope's Epiſtle to the King is ſo remarkable, that I think it deſerves a Place in this *Preface*.

PEtiſtis a nobis leges *Romanas & Cæſaris* vobis tranſmitti, quibus in regno *Britanniæ* uti voluiſtis. Leges *Romanas & Cæſaris* ſemper reprobare poſſumus; Legem Dei nequaquam. Suſcepiſtis enim nuper miſeratione Divina, in regno *Britanniæ* legem & fidem *Chriſti*. Habetis penes vos in regno utramque Paginam: Ex illis Dei gratia per Concilium regni veſtri ſume legem, & per illam Dei patientia, veſtrum rege *Britanniæ* regnum. Vicarius vero Dei eſtis in regno, juxta Prophetam Regem; *Domini eſt terra & plenitudo ejus orbis Terrarum, & Univerſi qui inhabitant in eo:* Et rurſum, juxta Prophetam Regem; *Dilexiſti juſtitiam & odiſti iniquitatem; propterea unxit te Deus tuus oleo lætitiæ præ conſortibus tuis:* Et rurſum, juxta Prophetam Regem; *Deus judicium tuum*, &c. Non enim judicium neque juſtitiam *Cæſaris: Filii enim Regis gentes Chriſtianæ & populi regni ſunt*, qui ſub veſtra protectione & pace

pace & regno degant & conſiſtant, juxta Evangelium; *quemadmodum gallina congregat pullos ſub alis* &c. Gentes vero regni *Britanniæ*, & populi veſtri ſunt, & quos diviſos debetis in unum ad concordiam & pacem, & ad fidem, & ad legem *Chriſti*, & ad ſanctam Eccleſiam congregare, revocare, fovere, manutenere, protegere, regere, ut poſſitis cum eo regnare in æternum, cujus Vicarius eſtis in regno prædicto, qui cum Patre & Filio, &c.

Laws of Nations were no mean Topics to be inſiſted upon in the Queſtion before your Lordſhip. For if, as Mr. *Selden* ſays, we derive our Laws from the Imperial Conſtitutions, as ſome other Authors have attempted to prove, contrary to the Opinion of Chancellor *Forteſcue* and the Lord Chief Juſtice *Coke*, then 'tis proper to have recourſe to thoſe Laws where our own Laws are ſilent. This is the conſtant Practice of *Weſtminſter-Hall*, when Queſtions of our Laws are implicated with Queſtions of the *Civil Law*; for in that Caſe your Lordſhip never refuſes to hear the Arguments of *Civilians*: And this Method agrees with the Practice of other *Law-Courts*, where the *Civil* and *Canon*

Cambden, *Spelman*.

Canon-Laws prevail. 'If a 'Caſe occurs, which is not de- 'cided by the Civil Law, or the 'ſame is not clearly, but doubt- 'fully and obſcurely expreſs'd, and is plainly 'and fully decided by the Canon Law, in 'ſuch Caſe the Interpretation is to be taken 'from the Canoniſts; and ſo, on the con- 'trary, the Senſe of the Civil Law is to be 'follow'd, where the Canon Law is doubt- 'ful and obſcure.'

Duck de Aut. juris civ. l. 1. c. 7. §. 11.

I do no where remember to have read in our Law any Caſe, that concerns the Surrender of Rebels to *Mercy* or *Diſcretion*; yet no doubt, among the various Rebellions which have tormented this Nation, ſome ſuch *Surrenders* muſt have been; and, if inſiſted upon, muſt have had a Deciſion before this Time. I hope, as this is the firſt Time, ſo I wiſh it may be the laſt, that any ſuch Queſtion may come before a Court of Juſtice within our own Nation: But this certainly is a Queſtion that concerns the *Laws of Nations*, and ought to be ſearch'd for, among the many valuable Records of ſuch Writers who have treated upon that Subject. How well I have perform'd it, muſt be left to the Diſcretion of the candid Reader.

I had the more Right and Reaſon to inſiſt

ſiſt on this Argument, becauſe the Witneſſes againſt the Priſoner (as appears by my ſhort Notes) did moſt of them prove a Surrender to *Diſcretion*, or Submiſſion to *Mercy*; and certainly (in my poor Judgment at leaſt) I had a *Right* to *argue* on whatever Evidence was given by the Proſecutors.

But why ſhould your Lordſhip charge me with *impeaching* the Trials that had been already made? Your Lordſhip knows, that thoſe Trials were no Evidence againſt us; and if other Perſons had omitted their proper Defence, 'twas no Rule for my Client to follow. Indeed, if my Advice had prevail'd, all the Priſoners ſhould have concerted the ſame Method of Defence; and every one chuſing his own Counſel, I adviſ'd they ſhould have had Conference with each other, and have agreed upon a common Method of Defence: For as their Caſes were for the moſt Part the ſame, ſo ſhould the Method of Trial; and then whoever had been firſt try'd might have brought the Queſtion regularly before your Lordſhip, without having other Trials objected as Precedents; tho' in Fact I think they are no Precedents, for every Man's own Caſe is his own Defence or Conviction.

And again, why ſhould your Lordſhip charge

charge me with *impeaching the higheſt Judicature in the Kingdom*, in the Trial of the Lord *Wintoun*, when I ſaid nothing diſreſpectful of them or to your Lordſhip? I ſaid nothing to queſtion the Legality of that unfortunate Lord's Trial or Conviction: I only reminded your Lordſhip, that in that Trial the Managers open'd a *Surrender at Diſcretion*, but the Lord impeach'd had omitted to make a proper Defence on that Head; and that if he had done it, I ſaid, *I doubted not their Lordſhips would have heard him*; but he that makes no Defence, or an improper one, leaves the Court to judge *ſecundum allegata & probata:* As if a Man be indicted before your Lordſhip for *Murder*, and a probable or circumſtantial Evidence is offer'd, and the Perſon accus'd (tho' innocent) will not make the contrary evident, your Lordſhip and the Jury in *condemning* him will be acquitted in the Opinion of all Mankind.

But all Perſons that come before that *noble Judicature* will gratefully remember the Words of a late learned Author, who hath ſet forth *What juſt Liberty of arguing and debating hath been allow'd to Counſel, and with what Candour and Patience they have been heard, even in the*

Sir *Bart. Shower's* Preface to Caſes in Parl.

the moſt TENDER POINTS; and when their Arguments and Authorities *were inforced and amplify'd in ſuch Manner as is not fit to be remember'd.* Ibid p. 189.

This is a *noble* Inſtance of the Juſtice of that Honourable Court, that rather than the Suitor ſhall complain of Hardſhip (as Loſers are apt to do) they will vouchſafe a *patient* Hearing, tho' the Advocate ſhould be ſo *unſkilful*, as to vent Arguments not well prepar'd and adapted to the *refin'd* Capacity of that *ſupreme* Judicature.

It will not be improper to conſider, who it was that firſt introduc'd the Male-treatment and Brow-beating of Priſoners, or Counſel, or Witneſſes.

The firſt Perſon that ever (as I could learn) attempted this Practice, was one of a *venerable* Name and Authority with us, but I reckon it no Addition to his Lordſhip's Character; it was perhaps the Man's Frailty or Paſſion. It was no leſs a Man than Sir *Edward Coke*; but his other learned Accompliſhments may make ſome Atonement for this Frailty. His Treatment of that learned *Engliſh* Patriot, Sir *Walter Raleigh* (when upon his Trial for his Life) is an Inſtance of this ungenerous Temper. He carry'd the ſame haughty Humour from

from the Bar to the Bench. Since his Time I have known no one to follow his Example but Sir *George Jefferies*, who, tho' he had ſome very great Qualifications to fit him for preſiding in a Court of Judicature, yet this is ſome Blemiſh to his Memory, with ſome others, which were rather the Fault of the Times than the Man.

But I have great Reaſon to complain of your Lordſhip's Uſage of me, in repreſenting my Argument to the Jury, as void of the *firſt Principles of the Law*; becauſe I offer'd to enquire, whether the Offence of my Client (according to the Proofs) did not rather come within the Purview of the Statute of 15 *Ric.* 2. *cap.* 2. and the Statute of 43 *Eliz. cap.* 13. The firſt relates to *Inſurrections*, or *great Riſings*, &c. the latter relates to *Hoſtilities*, ſuch as *Inſurrections*, *Robberies*, *burning and ſpoiling Towns*, &c. in thoſe Counties which were the Scene of the late Inſurrections; and other Statutes appoint how ſuch Offences ſhall be enquir'd into and puniſh'd: But your Lordſhip perſuaded the Jury, that the Statutes I cited related to the breaking down of Incloſures; which are puniſhable only (if I miſtake not) by the Statute 13 *Ed.* 1. 46.

13 Hen. 4. 7.

And ſurely, my Lord, ſince *Routs*, *Inſurrections*,

rections, &c. and *levying of War*, do ſo nearly reſemble each other, it was no improper Theme for an Advocate to inſiſt on the Compariſon, and to define what was properly levying of War within the Statute of 25 *Ed.* 3. and whether the Indictment ſhould not rather have been for adhering to Enemies, than that of levying War within the Dominion of *England*.

There was one Thing offer'd, which your Lordſhip thought fit to take no Notice of; and that was the Statute 5 *Edw.* 6. 11. which was repeal'd in the firſt Year of Queen *Mary*. By that Statute it was made Treaſon to *detain from the King any of his Caſtles or Holds, or other Fortifications of War; or any of his Ships, or Ordnance, or Artillery.* So that it ſeems this Offence was not counted Treaſon by the Statute 25 *Edward* 3. before that Time: And yet this was thought ſo hard a Law, that the Words of the Repeal are very remarkable; and 'tis there declar'd, that *the State of every King conſiſteth more aſſur'd by the Love and Favour of their Subjects towards their Sovereign, than in the Dread and Fear of Laws made with rigorous Pains and extreme Puniſhments.* —— 1 Mar. 1. *And that Laws made without extreme Puniſhment are for the moſt part*

 better

better kept: Therefore the Queen did repeal that Statute, to *prevent the Miſchiefs that had been caus'd by it, in bringing many* NOBLES *and others to* SHAMEFUL *Deaths.* So that, my Lord, it was very proper to have conſider'd, whether the Offence laid in the Indictment, of *ſeiſing* and *detaining* the Town of *Preſton* in a *traiterous* Manner, does remain Treaſon at this Day, or whether the ſame be old and *abrogated* Treaſon.

If this Objection prove a good one (as I ſee no Reaſon to the contrary) then the Conſequence will be, that (whatever becomes of the unfortunate Indictees) the Heirs of the Perſons convicted may reverſe the Judgments: And I doubt not this Argument, manag'd by a *learned* and able Advocate, will be to be found of ſome Weight.

This Argument will be of more Force, becauſe it ſeems to have receiv'd ſome Sanction from an *Engliſh* Parliament: For when King *Charles* I. (foreſeeing the Breach that was like to be made upon him) would have taken Poſſeſſion of *Hull*, the Lords and Commons juſtify'd the Governor in his Refuſal to admit the King.

I will not pretend to juſtify all the Actions that did precede or attend that *miſerable Rebellion*: But at the Time of refuſing

ſing the King's Entrance into *Hull*, the Civil War (I think) was not begun: Therefore the greater Regard is to be had to the Juſtification of the Parliament; for at that Time they were full of Addreſſes and Proteſtations of *Loyalty* to the King, tho' afterward they pretended to levy War againſt him by his *own Authority*: But I never heard by whoſe Authority he was murder'd before his own Palace.

But I will not now offer to ſet down any ſtrictures or Remarks on the Indictment and the other Proceedings. That Subject may more properly be the Buſineſs of another Treatiſe, if I ſhall hereafter find myſelf *capable* of commenting upon the *Principles* of Laws. The main Thing I deſign by this *Preface*, is to vindicate that *juſt Liberty of Speech* which belongs to the Profeſſors of Laws, in order to obtain a *juſt* and *righteous* Deciſion of their Cauſes.

The venerable Lord Chief Juſtice *Hale* was remarkable for his *patient* hearing of Trials; and for that Reaſon was, by ſome People, thought not to give that Diſpatch to Buſineſs, which others ſince his Time have valu'd themſelves upon: But his Rule was, *Let us ſtay a little, and we ſhall make the more Haſte.*

Every Man is ſuppos'd to be *innocent* till the

the Law finds him *guilty*. And therefore, when we plead for any Perſon, that is call'd a Criminal, we do however plead for an *Innocent Man*. And 'twill be but a taunting Expreſſion, and unworthy the Bench, to enquire of us, *What are you an* Engliſhman! *What will you juſtify Rebellion!* &c. I think the Rule of Sir *Matth. Hale* to be our perfect Juſtification: For when he was a Pleader, one aſk'd him, How he (who was known to be a Man of ſtrict Religion and honeſt Virtue) could argue for an *unrighteous Cauſe?* He very wiſely reply'd, that he knew not a Cauſe to be *unrighteous* till it was try'd: For as there were ſome People, who repreſented their Cauſes in the faireſt Colours, ſo there were others, that knew not how to ſtate the Truth of their Caſe to any tolerable Advantage; and that he had found many Cauſes that ſeem'd fair and plauſible, prove otherways upon tryal; and ſome Cauſes, of which he had conceiv'd an indifferent Opinion, were found upon Scrutiny to be very honeſt and upright.

And as the Law ſuppoſes a Man innocent before the Verdict paſſes upon him, ſo it has fenc'd the Circumſtances of his Trial with certain Forms and Solemnities, which, if *religiouſly* obſerv'd, will ſcarce ſuffer an

innocent

innocent Man to *periſh*; tho' poſſibly thereby (according to Lord *Forteſcue*'s Maxim) a guilty Perſon may eſcape Puniſhment.

Therefore what Provocation had your Lordſhip to charge *me*, or my *poor Client*, with *Trifling* and *Impertinence*, for making thoſe legal Challenges to the Jury, which the Law and the Wiſdom of our Anceſtors have provided in Favour of *Life*? Or why ſhould your Lordſhip reproach me with *Ignorance*, for inſtructing my Client to make ſome of the following Inquiries?

1. Whether the Jury-man was an *Engliſhman* born?
2. If he was of the *Grand-Jury* that found the Bill?
3. If he was a *Freeholder in the County*?
4. What was the *yearly Value* of that Freehold?
5. If he *liv'd in the County* at the Time of the Summons?
6. Whether he were by Profeſſion a *Butcher*?

The firſt of theſe Queries I always thought to be the Right of an *Engliſh* Subject. Indeed a Foreigner is to be try'd *per medietatem linguæ*. I never knew (ſo far I confeſs my *Ignorance*) till your Lordſhip inform'd

form'd me, that *every Freeholder was a Native*: I was of Opinion, that if a Foreigner had purchas'd a Freehold, 'twas forfeited to the Crown; and I am hardly yet convinc'd of the contrary: But if I was in an Error, I was deceiv'd by the Statute 11 *Henry* 4. *cap.* 9. which requires, that *Inqueſts ſhall be taken by the King's lawful liege People*,

The ſecond Query I thought was juſtify'd by the Statute 25 *Edward* 3. *cap.* 3. which enacts that, no *Indictor ſhall be put in Inqueſts upon Deliverance of the Indictees, if he be challeng'd for that ſame Cauſe by him which is ſo indicted*; and I thought I had a good Precedent for this Query in the Allowance of the Lord Chief Juſtice *Holt* upon the Trial of Mr. *Cook*.

As to the fifth Query, I rely'd upon the Statute of *Weſtminſter* 2. *cap.* 38. which among other Qualifications requires, that the *Jurymen dwell in the County at the Time of the Summons*.

The reſt were ſo obvious, that I did not perceive your Lordſhip was ſcandaliz'd at the Queſtions.

After the Trial had been thus *ſolemnly* enter'd upon, and the Witneſſes have been examin'd on both Sides, and the Advocates have had a fair and *patient* Hearing, they have

have no farther Care and Conſideration of the Cauſe, but *Fiat juſtitia, ruat cœlum.*

Loſers in all Cauſes, whether civil or criminal, are very apt to grieve: Some utter their Complaints againſt the Judge (for the moſt part unjuſtly, in my ſmall Obſervation;) others vent their Indignation againſt the Jury, as judging againſt Evidence; and I have known ſome charge their Counſel with the Loſs of their Cauſe, by neglecting to utter all the Impertinencies that are ſtuffed into a Brief: And very often the Impetuoſity of the Client puts the Counſel on ſome Arguments that are trifling and impertinent; and therefore when a Court conſiders that Counſel do but *perſonam induere*, and ſpeak in the *Perſon* of their Client, they will be apt to overlook any Digreſſions that are foreign to the Cauſe: And the Lord Chief Juſtice *Jefferies* had a very good Method to cure the Impertinence of Clients, when he perceiv'd them teaſing and prompting their Advocates to utter Arguments and Reaſons improbable or impertinent. I deny not, that if Counſel will miſbehave themſelves and affront the Court, or utter any Thing contrary to the Duty, Reſpect and Deference that is owing to Superiors, they may be properly animadverted upon: But if a Counſel ſhould ſo far miſtake

ſtake his Cauſe as to uſe trivial or improper Arguments, I ſee no other Puniſhment he deſerves, but that of *Pity* upon his Weakneſs, and *Dereliction* of his Clients.

There are ſome Advocates of conſiderable Worth, who are yet ſo diſtruſtful of their own Abilities, that they fear to utter before a *wiſe* and *learned* Judge what they think may be below his Capacity to hear: But in ſuch Caſe a candid Juſticiary will aſſiſt the Modeſty of the Man, and draw out of him what ſhall make him conſpicuous to the World. 'Twas to ſuch *Indulgence* and *Favour* that your Lordſhip firſt ow'd the Diſcovery of *your Merit*; and therefore the like Candour will become your Advancement to the Bench, and will induce you rather to pardon the Defects of Oratory, than upbraid the Advocate, to the Reproach and Scandal of his Profeſſion or Underſtanding.

Your Lordſhip knows that in criminal Cauſes, eſpecially thoſe that concern Life, great Scope is given, not only for denying the Charge and holding the Proſecutors to *ſtrict* Proof, but of extenuating and alleviating the ſuppos'd Crime, and even of avoiding the ſtrict Words of thoſe Laws upon which the Party ſtands accus'd: And becauſe there lies no Appeal from the Verdict

of

of a Jury (as is allow'd in ſome Countries from the Sentence of the Judge) there lies ſome ſort of Equity in the Breaſt of the Judge and Jury, to mitigate the Rigor of Law. This daily happens in Indictments of *Murder*, where the Jury give not a direct Anſwer of Guilty or not Guilty to the Charge in the Indictment, but find it Manſlaughter, Chance-medly, or Self-defence; as the Rule of Equity inclines them.

Your Lordſhip is not ignorant what noble Fields of expatiating in Favour of Life were us'd by the *Roman* and *Greek* Orators; and I do not think that leſs Scope ought to be indulg'd to *Engliſh* Pleaders: I am ſure, that if I thought myſelf capable of imitating their Perfection, I ſhould think myſelf equally oblig'd to do my *beſt* for my Clients.

The *Opinions* of Witneſſes (who know nothing of the Fact whereof the Party ſtands accus'd) are allow'd by our Courts as a full Teſtimony, both in civil and criminal Actions. We do well remember the Accuſation of a black Crime that fell upon a worthy Gentleman; who, in all Probability had fallen a Sacrifice to his Accuſers, if he had not been preſerv'd by the learned Arguments and *Opinions* of ſkilful Surgeons,

Cooper

If your Lordſhip would have patiently indulg'd my Client half an Hour's Time, in the Examination of thoſe *noble* and *worthy Generals* who were ſummon'd to give Evidence of the *Nature of Surrenders*, I ſhould have thought my Client without Cauſe of Complaint; and I ſhould have acquieſced in your Lordſhip's *learned Determination*: Or if the Jury had allow'd him the Benefit of a Special Verdict, your Lordſhip's *Juſtice* would have been *conſpicuous*, in hearing the Arguments of thoſe who are better capacitated to illuſtrate that Subject, than I was prepar'd to do.

D. *Argyle*,
L. *Windſor*,
Stewart,
Webb,
Roſs, &c.

There was no Danger that one of my *mean Abilities* ſhould ſay any thing that would influence the Jury to give an *unrighteous Verdict*; and your Lordſhip's Capacity, which is ſo much ſuperior to mine, would have ſilenc'd what was impertinently offer'd: But if I had hinted any thing that might have been of Weight to the ſaving of a Man's Life, your Lordſhip's *Honour* and *Conſcience* would have directed you to improve the Argument for the Advantage of your Fellow-Subject.

For the Trial of the Crime (rather than the Man) being the eſſential Part in the

Trial

Trial of a Priſoner, no Queſtion is improper that may extenuate or purge that Crime. Thus in ſome Caſes of the Trial of a Woman for Felony, your Lordſhip does admit a Queſtion to wipe off the Guilt, by enquiring if ſhe was *compell'd* thereto by Dureſs or Commands of her Huſband; which is a Queſtion that rather avoids than denies the Fact.

So in *treaſonable Rebellions*, the Evidence of Force and Compulſion is rather a Mitigation of the Offence, than a Denial of the Crime: Yet this Equity is reſerv'd in the Breaſt of a Jury to conſider. And if your Lordſhip had admitted the other Queſtion, about a Capitulation to *Mercy* or *Diſcretion*, and inform'd us by your learned Opinion, whether it amounted to the Purgation of the ſuppos'd Crime, it might have been of infinite Satisfaction to an ignorant Priſoner, or his *more ignorant* Counſel.

I fear I have too much tir'd your Lordſhip's Patience with a long Preface: But I muſt crave Leave to detain you a little longer, till I have made ſome ſhort Remarks upon thoſe Caſes you quoted to the Jury. I did not think myſelf oblig'd to cap Caſes againſt my Client; and if they had been urg'd by the Counſel on the other Side, ſhould have endeavour'd to have given a modeſt

modeſt Anſwer, without impeaching former or late Judgments: Neither do I think myſelf ty'd to believe every Precedent in our Law-Books to be good and ſubſtantial Law; nor does your Lordſhip think yourſelf oblig'd to follow every *erroneous* Opinion there deliver'd, when your own judicious Opinion ſuggeſts a better Cauſe of Judgment.

For the Judges being *Lex loquens*, and *ſubſtantial Reaſon* being the only Foundation of Law (where the Law is not *Lex ſcripta*,) your Lordſhip cannot be bound by Precedents *againſt Reaſon* (tho' they ſhould happen to be *Reſponſa prudentum*;) which is the true Occaſion of different Judgments in our Law-books.

The Caſes which your Lordſhip cited, were thoſe of the Rabble that aſſaulted the Archbiſhop's Palace in the Reign of *Charles* I. the pulling down of Bawdy-Houſes in the Reign of *Charles* II. and that of demoliſhing the *memorable* Meeting-Houſe of *Daniel Burgeſs*, in the Reign of Queen *Anne*: And I think thoſe Opinions of the Judges, which put a Stop to the Execution, were the ſafeſt to follow; for your Lordſhip ſees the Gradation in Convictions of Treaſon, from a *Palace* to a *Bawdy-Houſe*, and from a *Bawdy-Houſe* to a *Meeting-Houſe*.

Houſe. I dare believe that thoſe, who gave their Opinion in the firſt, never thought the Precedent would be ſtretch'd to the two laſt. And this ſhews the Danger of departing from the Words of Penal Laws, and will, after two or three more Caſes, render the Doctrine of Treaſon, as uncertain as it was before the Reign of *Edward* III. which caus'd that memorable Statute which remain'd as the Standard of Treaſon for many Reigns.

Theſe Caſes (in my poor Judgment) have overthrown the Diſtinction of *Routs*, and *unlawful Aſſemblies*, and have ſuperſeded the Uſe of the Statutes on that Subject, and ſeem to contradict the various Methods of expounding Statutes, laid down by my Lord *Coke*, and other Writers of the Law of *England*; ſome of which are to be *beneficially* expounded, and others to be taken ſtrictly according to the *Letter*.

And this I take to be the true Difference, between *Divine* and *human Laws*, where theſe are reduc'd to Writing; that the firſt are to be expounded according to the *Spirit*, and divine Senſe, but the latter are to be ſtrictly interpreted, according to the *Words* and *Letter* of the Law.

I hope that what I have written is not capable of Miſconſtruction: I am ſure I have

have endeavour'd that it ſhall not give juſt Offence to your Lordſhip; and ſhall think myſelf happy, if it may any way contribute to ſet me right in your Lordſhip's Opinion; and that you may hereafter indulge me and my *Brethren in the Liberty of Speech*, which is neceſſary to *inform* your Lordſhip, in the difficult Taſk of deciding between right and wrong.

If I ſhall at any Time hereafter urge Arguments improper, or miſpend your Lordſhip's Time by prolix, or tedious Speeches, I flatter myſelf you will conſider, that they who ſtand in my Place, are like the Prieſts of the old Law, who *Lev.* xxiii. 11. *wave the Sheaf in the Ear*; and 'tis your Lordſhip's *Wiſdom*, as well as *Duty*, to ſeparate the *Wheat* from the *Chaff*.

And I beg your Lordſhip to conſider, that tho' our Amplifications may paſs into Air and empty Sound, yet your Lordſhip's *Decrees* remain as Precedents and Directions to future Ages: And if, thro' Haſte, Impatience, or want of due Information, you ſhould eſtabliſh any erroneous Principle, this may affect not only our, but your Lordſhip's own Poſterity; nay, the Providence of God does very often puniſh Men, by thoſe very Laws and Decrees, which they have

have advanc'd for the Deſtruction of others. Thus *Haman* ſuffer'd by the ſame Means he had contriv'd for *Mordecai*. But what need I travel to the *Eaſt* for a Precedent, when our own Hiſtories furniſh us with ample Teſtimonies of *Woes*, denounc'd upon thoſe, *who decree unrighteous Decrees?* No doubt *Treſilian*, *Empſon*, *Dudley*, Lord *Cromwel*, and others, were great Favorites to their reſpective Princes, and thought by their Zeal (in ſerving their Maſters) to ſignalize their *Loyalty*; but they found, to their Sorrow, the Thongs they had ſtretch'd, were made a Scourge to their own Backs.

Now *unrighteous Decrees* may be pronounc'd two ſeveral Ways, either when the Judge does it thro' Corruption, Bribery, or Solicitation of blood-thirſty Managers; as was the Caſe of *Naboth*, who was *made* guilty of Treaſon only for the Sake of his *Vineyard*: Or elſe an *unrighteous Decree* may paſs by over-much Haſte in the Trial, without a due and careful Examination of the Witneſſes. I hope the whole Nation will acquit your Lordſhip of the *former*: But the latter was the Caſe of *Suſanna*, who, by the *Moſaical* Law, was condemn'd for *Adultery*; and yet, I find the Judges not accus'd of Corruption, but *Haſte* and *Negligence* 1 *Kings* xxi.

ligence, without a due and critical Examination. No doubt they had full and ample Evidence to justify their *Verdict*; for two *grave Elders* had given an agreeing Testimony. This was consonant to Law: But nevertheless, those who pass'd the Sentence, were call'd *Fools* for so doing, *without Examination: Are ye such Fools, ye Sons of* Israel, *that without Examination or Knowledge of the Truth, ye have condemn'd a Daughter of* Israel? Yet in all Appearance, a just and impartial Trial had pass'd upon her; but thro' *Haste*, or *Negligence*, a due and proper Enquiry had not been made into all Circumstances, necessary for the Defence of an innocent Woman.

Verse 48.

If a Judge incline his Favour to any Side, it ought to be to that of the *Sufferer*. This was the Principle of Sir *Matthew Hale*, one of your Lordship's Predecessors (so often mention'd in this Preface;) who, under the Usurpation of *Cromwel*, protected the *Cavaliers*, when they were brought before him upon merciless Prosecutions, and, after the Restoration of the King, screen'd the *Republicans* from many Severities. This shew'd the Man's Disposition inclin'd to Mercy. The like Moderation

is

is commended in *Pomponius Atticus*, during the diſtracted State of his Country, and the Prevalence of different Factions. *Corn. Nep.*

Your Lordſhip is ſkill'd in *Logical Art*; and perhaps, may draw ſome Concluſions from theſe Premiſſes: But I am not anſwerable for the Conſequences of *juſt Principles:* I can proteſt my Innocence, that I have not deſignedly ſaid any thing diſreſpectful or undutiful to your Lordſhip.

I ſhall only wiſh, that when your Lordſhip ſhall appear before the Great Judge of Heaven and Earth, you may not want an Interceſſor to plead *your Cauſe*, againſt the *malicious Accuſer:* Nay, I hope and pray, that *your Judge* and mine may be our *Advocate*; and beg your Lordſhip to practiſe that which is your own *Hope* and *Expectation*; that when any Priſoner appears before you, you will be both his *Judge and Advocate:* And as you deſire a Mitigation of *your own Offences* at God's Hand, ſo you will (as far as is conſiſtent with Juſtice) mitigate the Accuſation of thoſe who ſtand before you, for a Sentence of *Life* and *Death*.

And *God give you Wiſdom in your Heart, to judge his People in Righteouſneſs, that their good* Ecclus 45. 26.

Things be not aboliſh'd, and that their Glory may endure for ever. I ſhall conclude all, with the Prayer of a Reverend Prelate.

O Domine Dominorum, & Rex Regum,
Memor eſto Principum omnium, quos
Dignos deputaſti qui in terrâ regnarent.
Et imprimis memor eſto
Regis noſtri Deo cari,
Et magis magiſque cooperare
Et ſecunda eum in omnibus:
Loquere ad ipſius cor bona,
Propter Eccleſiam tuam,
Et omnem populum:
Largire illi altam &
Non eripiendam pacem,
Ut in ipſius tranquillitate
Quietam & tranquillam vitam agamus,
In omni pietate & caſtitate.
O! a quo ordinatæ ſunt Poteſtates,
Largire iis qui in Palatio eminent,
Ut in virtute & timore tui emineant
Concilio, ſanctam tuam prudentiam
Proceribus, nihil facere contra,
Sed pro veritate valere:
Judicibus *noſtris, Judicia tua,*
Et judicare in omnibus *omnes, ſine*
Præjudicio, *vel in alteram partem declinando.*

Prec. *Andr.* p. 51.

A TREATISE OF THE *Laws of* ENGLAND.

CHAP. I.

Of Laws *in general.*

IT ſeems ſuperfluous, after the elaborate Works of learned Authors, who have beſtow'd their Pains on Treatiſes of Laws, to ſay any thing concerning their Nature and Original: But becauſe the Writings of learned Men are not ſuited to the Capacity of every Reader, and for that I have deſign'd this ſhort

Treatiſe for the Benefit of my Countrymen of the meaneſt Capacity, in order to rectify ſome Notions, which too much prevail, ſo as to become *vulgar Errors*; I have deſign'd this Chapter as a Preface to the following Diſcourſe, wherein I ſhall endeavour out of Love to my Country, to lay down ſuch Principles as (if follow'd) may be for the Honour and Credit of our Laws; for I can, without Vanity, affirm, that I always have the Intereſt of my Country at Heart, and ſhall prefer the Public to my private Intereſt.

Thoſe who have written of Laws, however they may vary in their Definitions, do all agree, that *LAW is the Rule by which good Things are commanded and evil Things prohibited.*

'Tis certainly for the Benefit of Mankind, that they ſhould ſubmit to the Rule and Governance of Laws: For 'tis only by their Maxims and Authority that Peace is preſerv'd in the World; and if every Man's *Will* were the Meaſure of his Actions, the World would ſoon degenerate into a worſe State than its primitive *Chaos*, and Mankind would be the unhappieſt Part of the Creation; therefore their Safety and Happineſs is fenced about and circumſcrib'd with

certain

certain Laws, as a Guard and Defence to ſecure their Felicity.

It is reckon'd none of the leaſt Inſtances of the Care and Love of God to Mankind, that he brought Men out of the *howling Deſart* to plant them in *Cities*, and gave them *Laws* to live by.

For whatever ſome Men talk of *natural* Inſtinct and *natural* Reaſon, 'tis manifeſt, that the *Revelation of God's Will* to Men has been the only Means of reducing them to Order and Society: And however that *Revelation* may be obliterated in the Minds of thoſe who follow not the *true God*, and however their Manners may be degenerated, yet we find that thoſe poor Wretches who have *no Notion of a God*, are wholly void of that Reaſon which ſhould unite them into Societies.

All Laws are divided into Divine and human Laws. Divine Laws are thoſe Laws which were either deliver'd by God himſelf, as the Guide of our particular Actions, or elſe by him planted in the Reaſon and Nature of Man, and are therefore call'd the Laws of Nature: Tho' it muſt be confeſs'd, that thoſe human Laws, which do not contradict the *Laws of God*, have the Character of the *Divine Law* imprinted on them; becauſe where God Almighty has not prohibited,

hibited, or commanded any thing, he has left them to their Diſcretion, how and in what Manner Laws ſhall be enacted for the Good of Society; and by giving a general Command to obey Magiſtrates, he has given to Human Laws a Divine Sanction.

CHAP. II.

Of the LAWS *of* GOD.

THE *Laws of God* are thoſe Laws which he has been pleas'd to give Mankind for the Guidance of their Actions. Many of them regard the outward Polity of Cities and Families; others do regard their religious Worſhip; and ſome again relate to the Government of their private Thoughts and Actions. Thoſe that concern the Civil State of Mankind, muſt be taken and underſtood according to the expreſs Letter of the Law; but many of thoſe which relate to the private Government of Life muſt be underſtood in a Spiritual and refin'd Senſe, which will not be the Subject of the preſent Treatiſe: Neither ſhall I concern myſelf with thoſe Laws which

which relate to the civil Polity and Government of States, which are applicable to the Affairs of Peace in the Diſtribution of Rewards and Puniſhments; but ſhall only take Notice of ſuch Laws which concern the Affairs of War with foreign Enemies, or Tumults and Rebellions within the Body of the Republic.

As God Almighty is a merciful Creator, ſo when he puniſhes Mankind by committing Wars, he has ſettled and appointed certain Rules and Conditions upon which he will have the ſame manag'd; and has given Directions, not only how a War ſhall be begun and carry'd on, but has commanded how Captives ſhall be treated that are overcome in War.

As to the Beginnings of War, he has commanded, that upon Approach to any City, before Hoſtilities are begun, *Peace ſhall be proclaim'd unto it*, Deut. xx. 10. which Practice continues at this Day, in the Summons that is uſually ſent by the General before the Army opens their Trenches. And if the City ſurrenders, or ſubmits to *Mercy*, and *makes an Anſwer of Peace*, every *Life* is ſav'd, and the Inhabitants are only to be made Subjects or Tributaries.

This was the Ground and Foundation of

of that Meſſage that was ſent to the *Benjamites* by the *Jews* before they began a civil War: For when a *Levite*'s Wife had been ſhamefully abus'd and murder'd, the *Jews* firſt ſent a Meſſage to demand Satisfaction, and a Surrender of the Malefactor, (*Judges* xx. 11.) and becauſe that was deny'd, a bloody civil War enſu'd.

And the Practice of our wiſe Anceſtors was copy'd from this Example. For in the Beginning of Inſurrections and Rebellions 'twas uſual to iſſue a Proclamation, offering *Mercy* to thoſe that ſurrender'd; with the particular Exception of a few, who were the firſt Ringleaders and Raiſers of Commotions.

All the Laws of God are ſettled upon the ſure Foundations of *Mercy*; which is the chief Attribute of God himſelf, whoſe Works of Mercy, we are told, do *exceed all the reſt*.

If God Almighty had not eſtabliſh'd ſome Rules of *Mercy* in the Proſecutions of War, 'tis likely that Mankind, when they had undertaken to avenge their own Quarrels, would have degenerated into the Fierceneſs of wild and ſavage Beaſts; as we ſee the Practice of the *Indians*, and other unciviliz'd People at this Day.

And the End of a juſt War being the Repa-

Reparation of Injuries, and ſettling a fair and honeſt Intercourſe between Nation and Nation, 'tis fit the ſame ſhould be proſecuted with ſome Meaſures of *Honour* and *Juſtice*. For if the Paſſions of Men be indulg'd to Acts of Cruelty and Reſentment, the Difference will increaſe till it becomes irreconcileable, and will protract the War till one of the contending Nations is extirpated; of which many Inſtances are to be given.

Therefore all civiliz'd People, eſpecially thoſe who have the Knowledge of God and his Laws, do not carry their Reſentments beyond the *Rules of Honour*; but do ſubmit to thoſe Laws of War, by which the Effuſion of Blood is ſpar'd, and a Way eſtabliſh'd for ſettling future Peace and Unity between the Nations at Variance.

The *Romans* had a Court or College which was call'd *Collegium Fecialium*. This Society is ſaid by *Dionyſius Halicarnaſſeus* to have been erected by *Numa Pompilius*; and their Buſineſs was to conſult and determine of Leagues and Confederacies, of Injuries and Oppreſſions done to their Subjects or Allies, of Embaſſies, of denouncing War, or making Peace; and the Laws relating to this Subject were call'd *Jura Fecialia*.

But the *Jews* had a more ſure Rule to walk by in the Proſecutions of their Wars. For they had the Privilege of conſulting the Oracle of God. Thus we find *David enquir'd of the Lord* before he ventur'd to relieve *Keilah*, which had been beſieg'd by the *Philiſtines*; and after he had deliver'd the City, and was about to take Shelter there from the Fury of *Saul*, who was approaching thither with a great Hoſt to ſeize him, he again enquir'd of God, If 'twas ſafe for him to tarry there: And having receiv'd an Anſwer, took Care to ſecure himſelf by Flight. The like Enquiry was made by the *Jews* before they made the laſt fatal Attack upon the *Benjamites*. They had alſo the Direction of the Holy Spirit of God in the Prophets, upon whoſe Advice they would either proſecute or ceaſe to make War. Thus we find, that when *Rehoboam* had gather'd an Army, to recover that Part of the Kingdom which had revolted from him, he was immediately oblig'd to diſband them by the Advice of the Prophet *Shemaiah*.

1 *Sam.* xxiii.

Judg. xx. 28.

1 *Kings* xii.

The Manner of their making War may be gather'd from *Numb.* x. and *Deut.* xx.

Their

'Their Preliminaries to Fighting were these; The *Priest* was to *sound* to *Horse*; the Air us'd to be martial and awak'ning; then one of the College of Priests was pitch'd upon to make a Speech to the Soldiers, and to encourage them to behave themselves well, from the Topics of *Interest, Honour and Religion:*' The Manner and Order of their Camp may be seen in *Numb.* ii. *Collier's* Dict. verb. WAR.

CHAP. III.

Of the LAW *of* NATIONS.

THE Laws of Nations are those Laws, which are us'd and receiv'd by all Nations; and are the common Principle by which several Kingdoms are (as it were) compacted into one Society. And the Laws of civil States and Kingdoms are but the Species of the Laws of Nations; for the Law of Nations is the Rule of all People, which natural Reason has establish'd among them. By some 'tis call'd the *Law of Nature*; and is so sacred, that 'tis the Rule of Equity

Equity and Practice of all Kingdoms, and is firmly eſtabliſh'd, and made immutable by the Providence of God: And he has plac'd the ſame in the Heart and Mind of Man (as in living Tables, created after the Image of God;) for there is nothing ſo neceſſary for Man, as certain Rules and Principles of orderly Living.

'Tis by theſe natural Rules that any Peace and Commerce is preſerv'd in the World. For if Nations did not ſubmit to and practiſe thoſe Laws, which are call'd the Laws of Nations, the State of Mankind would be a perpetual War: For every Nation being independent of each other, would be ty'd to no Rules of Right or Wrong, but would rob and prey upon one another, as Occaſion or Opportunity offer'd; which would render the State of Mankind worſe than that of ſavage Brutes: For among thoſe, *Like* will conſort with its *like*; *Sævis inter ſe convenit urſis:* But we ſee Mankind ſo ſubject to Strife and Variance, that they are ſcarce to be reſtrain'd from Rapine, Violence, Murder and Oppreſſion, by the ſtrongeſt Ties of Laws, whether human or Divine.

Cicero calls the Knowledge of the Laws of Nations an *excellent Science*; for that it treats of the State of Kings, People, and

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foreign Nations, and is chiefly converſant in the Affairs of War and Peace.

The Footſteps of theſe Laws may be trac'd in the *Holy Writings*, in the *Pandects*, *Juſtinian Code* and other Authors, both *Greek* and *Latin*; whoſe Teſtimonies do amply declare what has been receiv'd as ſuch, by Inferences drawn from natural Reaſon, and from the Cuſtom of Nations: And therefore, whatever has been determin'd thereon, at divers Times, and in divers Places, can be nothing but the Reſult and Concluſion of the Principles of Nature, or common *Conſent* of Nations; which *Conſent* has been eſtabliſh'd by Treaties, Agreements, and Confederacies, and are no leſs binding among Nations, than Laws made by general Conſent do bind particular Kingdoms and States.

CHAP. IV.

Of PUBLIC FAITH.

A Principal Part of the Law of Nations is that of *Public Faith*, and is the only Tie or Obligation by which Peace

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is preſerv'd among them, and has the ſame Force between ſeparate Kingdoms, as Laws have in particular Societies: For there being no ſuperior Power to enact and enforce Laws, for the Government of ſeveral independent Kingdoms, their Peace and Amity is maintain'd by the Obſervance of Public Faith, and a Breach of that Public Faith is a ſufficient Ground to commence a War.

The Laws of Nations do require, that the Subjects of each other do paſs to and fro upon their lawful Occaſions; and where this Commerce is interrupted, a Breach of Faith enſues.

'Tis by Virtue of this Public Faith, that Embaſſadors, and even Heralds and Trumpeters, are permitted to paſs and repaſs in Safety; and no other Security for Peace or Truce can be given, but that of *Public Faith.*

But this Public Faith does not only regard different and diſtinct Kingdoms, but is Part of the Law of every particular State, and is that which enforces Obedience to other particular Laws. For all Laws may be divided into private and public Laws: Thoſe which concern the public Benefit of the Common-Wealth, are no Man's particular Property, tho' every Man receives

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Advantage by them, in the Utility that accrues to the Public.

The Oaths that are taken between a King and his People is the Bond of this Public Faith; and every Magiſtrate and public Officer gives this Security of *Public Faith*, for the faithful Diſcharge of his Duty.

The *Roman* Law reckons, that Money paid into the Treaſury is ſo paid upon *Public Faith*, like as we do Money paid into the Funds of Parliament; and the Embezzlement of this Money is a Breach of *Public Truſt*, and as ſuch is to be puniſh'd; and a Damage done to the Public is more grievouſly to be animadverted on, than that done to particular Perſons.

But the Public Faith of a Kingdom is more conſpicuous in the *Tractatus* that is between a King and the States of his Kingdom; where the mutual Promiſes and Treaties between each other are held ſacred and inviolable: And Laws made by a King and his People are ſo many public Contracts and Agreements.

But there is alſo a Public Faith between Governors and particular Perſons: And 'tis in Virtue of this *Public Faith*, that private Perſons, going and returning from the King's Courts, as Suitors or Witneſſes, have Free-

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dom from Arreſts; and Members of the great Council of Parliament have the ſame Protection in going, ſtaying, and returning for a certain ſtated Time, before and after the Sitting or Riſing of any Parliament.

'Tis in Virtue of the ſame *Public Faith*, that thoſe who commit Piracy or Robbery, do ſurrender themſelves upon the King's Proclamation, and thereby obtain the Benefit of Indemnity, which they are entitled to, without any particular Pardon; and if they ſhould be indicted for the Offence, the *Public Promiſe* of Pardon is a ſufficient Purgation of the Crime.

And there is alſo a like Promiſe of Pardon imply'd in the Caſe of *Approvers*; and this upon the Ground and Foundation of Public Faith.

And this *Public Faith* extends even to Treaties with *Rebels* and *Traitors*. But this being a nice Subject, and fit for the Conſideration of an abler Writer, I ſhall refer the Reader to thoſe Authors who are of much better Authority, without enumerating the Particulars whereto ſuch Treaties are applicable.

I ſhall not ſcruple to grant, that 'tis the Duty of every General not to *treat* with Rebels, Pirates, or Robbers, nor receive *Meſſages* from them, nor accept their *Hoſta-*

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ges, if it may be refus'd with Safety and Honour to the King's Troops; tho' it may perhaps be his Duty to grant them *Quarter*, till the Mind of the Prince be known, how they ſhall be diſpos'd of: But if a Treaty be had, and any Terms or Conditions allow'd, 'tis of the *utmoſt Conſideration*, that the *Public Faith* be not violated.

And in all Treaties, where *Public Faith* is the Security, it is the Opinion of learned Writers, that all Ambiguity in the Interpretation of the Contracts is to be avoided: And the ſame is to be underſtood in the open and plain Senſe of the Words contain'd in ſuch Stipulation, according to the uſual Sound or Underſtanding of them in common Speech; for *Omnis Interpretatio eſt ſiniſtra & extranea quæ auribus vulgi non conſonat:* And the *Romans* are much blam'd for their ſubtile Diſtinction between *Urbs* and *Civitas*, when they reſolv'd upon the demoliſhing of *Carthage*, contrary to the Treaty of Capitulation, the Terms whereof were thus expreſs'd; *Civitatem* Carthaginienſem *ſalvam fore, eoſq; jura, privilegia, immunitates eaſdem habituros quibus antea uſi fuiſſent.* And therefore, when 'twas debated in the *Roman* Senate, how to elude the Treaty of Peace made at *Candium*, a City of the *Samnites*,

Gentilis, Grotius, &c.

nites, their King *Claudius Pontius*, plainly told them, *If the People of* Rome *repent their Bargain, let them reſtore our Legions to their Camp; let them render us our Arms, which by Treaty we gave up, and let us return to our Tents again.*

There are many Inſtances of the Sacredneſs of *Public Faith*, and of the Blemiſh and Diſgrace on the *Violators* thereof: But I ſhall give only an Example of each for the Satisfaction of the Reader.

When *John* King of *France* was taken Priſoner by the *Engliſh*, he was ſet at Liberty, upon his *Parol* to return, if he could not perform the Conditions of Ranſom ſtipulated between them; and accordingly he choſe rather to deliver himſelf into the Hands of his Enemy, than violate the *Faith* he had given.

But the Memory of *Francis*, King of the ſame Realm, is not ſo honourable, on account of his Breach of Faith with the Emperor, after he had promis'd to ratify the Terms of Peace, ſo ſoon as he ſhould return into his own Country, and which were the Conditions of his Enlargement: But he eluded the ſame, on Pretence, that the Articles were extorted by Force and Dread of his Impriſonment, and that the States

States of his Kingdom would not conſent to the ſame.

And Kings are not only bound by their own Agreements or Contracts, but even by the Treaties and Agreements of their Ambaſſadors and Generals, tho' the ſame were ſtipulated contrary to their private Inſtructions; and the Violation of their Treaties and Agreements, is deem'd a *Violation* of the *Public Faith.*

For Ambaſſadors and Generals are Perſons of *Public Character*, and repreſent the Perſon of the Prince; one in the Affairs of Peace, and the other in the Affairs of *War*; and what they act in the Name and by the Authority of the Prince, is as if the ſame were tranſacted by the Prince himſelf. *Grotius* makes ſome Difference as to the Power of a General, that he cannot make any Grant, or Conceſſions of Towns or Territories, already acquir'd by War: But in thoſe Things, that are not yet acquir'd, he has Power to remit any Part of that Acquiſition which he is about to make; for that very often Towns and People do *ſurrender* themſelves, upon certain Conditions of preſerving *Life, Liberty and Goods*; concerning which the Circumſtances of Affairs will not give the General Time to enquire the Mind and Conſent of the Prince.

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It remains now to enquire, if this *Public Faith* is at all Times to be obſerv'd; and I make no doubt to anſwer in the Affirmative, tho' I know that in ſome particular Caſes it is otherways determin'd.

As no one doubts, that 'tis lawful to make Repriſals; yet I do not call this a Breach of *Public Faith:* For the Laws of War do allow, that if either Party do tranſgreſs their *Parol* to each other, the Party offended is juſtify'd in the Breach of his Capitulation, tho' never ſo ſolemnly tranſacted; and this upon the ſame Ground and Reaſon upon which the War did at firſt commence. For there being no Superior between the contending Parties, Repriſals are a ſort of Military Juſtice. 'Tis the ſame, if an Officer or private Soldier do, upon their being taken Captive, give their *Parol* not to ſerve again in the War againſt that Party who reſtores their Liberty; this Breach of *Parol* will juſtify the taking of Life, tho' they do afterwards ſurrender upon Articles; and this, as a Puniſhment, by the Rules of martial Juſtice for *Breach* of the *firſt Faith.*

To illuſtrate this Subject, it may not be improper to relate out of ſome Authors who have treated on that Subject, what are the chief Breaches of the Public Faith. And

'1. *Public Faith* is broke, if under pre-
'tences of Treaty an Ambuſcade is laid. Thus *Attalus* and the *Roman* Legates were enſnared when *Pruſias* King of *Bithynia*, inſtead of one thouſand Horſe (which was the Number agreed on each ſide) brought his whole Army to the Conference. 2. When a Treaty is managed with Fraud and Treachery: As when *Albert* Earl of *Franconia* was beſieged in an impregnable Fortreſs, the Caſtle of *Bamberg*, by the Emperor *Lewis*, whoſe Son he was accuſed to have murder'd, *Otho* Biſhop of *Munſter*, pretending to be a Mediator, ſolemnly ſwore to *Albert*, that if he would *go out* along with him to the Emperor, he would either make *Terms of Peace* or ſee him ſafe back into his Caſtle; and *Albert*, truſting to his Promiſes, went with him out of the Caſtle; and as ſoon as he was got out, inſtantly perſuaded him to return back, and dine firſt, leſt they ſhould be obliged to tarry too long with the Emperor: Which he conſenting to, they then *went out again*, and came to the Emperor; but immediately *Albert* was ſeized and condemn'd to Death. And when he upbraided the Biſhop with

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'breach of Faith, the Biſhop replied, that 'he had *once* ſeen him ſafe back, but did 'not promiſe it ſhould be *twice* done. 3. 'When any Injury is offer'd to Am-'baſſadors, or thoſe who come to treat of 'a public Peace, or Truce. 4. When any 'ſafe Conduct is violated: Thus *Alexander* 'is accuſed, that he ſuffer'd thoſe to be put 'to Death in their Journey, whom he had 'diſmiſſed from his Preſence. 5. When a 'Truce is kept deceitfully: As when the '*Thracians* had agreed to a Truce of *thirty* '*Days*, they laid waſte the Country by '*Night*; pretending the Truce did not 'extend to *Nights* as well as Days. 6. 'When the Terms and Conditions of '*Ranſom* are not purſued: As was done 'by One, who was diſmiſſed with ten 'others of his Comrades by *Hannibal*, 'upon ſecurity of their Oaths, to return 'if they could not perform the Conditions 'ſtipulated between them; but after he 'was got out of the Camp he ſuddenly 'return'd again, as if he had forgot ſome-'thing, and then went after his Comrades: 'But the reſt returning to *Hannibal*, *re* '*infecta*, he went home, as if his deceitful 'return into the Camp had abſolved him 'of his Oath; which as ſoon as the Senate

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'understood, they order'd him to be seiz'd, 'and sent under a Guard to *Hannibal*. '7. Public Faith is violated when the *Con-'ditions of Surrender* are not observed; as 'when those who have surrender'd upon 'Terms of preserving Life, Goods or Li-'berty are put to Death, or otherwise 'made Captive, or Slaves. Thus when a 'Garrison (putting their Governour into 'Prison who refused to surrender) had 'made Terms with *Solyman*, and *surendred* 'themselves, he order'd the Governour to 'be honourably treated, but the Surren-'derers were put to Death; for which he 'is commended by some, because the Sur-'renderers had violated their Faith to the 'Governour.' But certainly this was a *breach of Faith* in him, towards those who had surrendred themselves, and is more agreeable to *Turkish* than *Christian* Princi-ples.

The Consideration of Public Faith was of such Weight with that *merciful* Prince, King *Charles* II. and the *Blessed Parliament* which restored us to our ancient Liberties and Constitution, that because a Number of the Regicides had conceived some *Hopes* of Impunity from the *Gracious* Words of the

12. *Car.* 2. cap. 11. the King's Proclamation, they inſerted a Clauſe in the Act of Indemnity, for ſparing the Lives of thoſe Traitors who had *ſubmitted* to the King's *mercy*; as will be afterwards ſhewn under the Head of *Amneſties*, Chap. 11. of this Treatiſe.

Some Perſons have doubted, if Faith is to be kept with Pirates, Highwaymen and Robbers. *Cicero* declaims much againſt it, *Cum hoc nec Fides eſſe debet nec Jusjurandum commune.* But *Cæſar* was of another Mind; and he tells us of a Treaty made and obſerved by the *Roman* Generals with the *Banditti* and Fugitives in the *Pyrenean* Mountains: For tho' there is not that Commerce with Robbers, as with Enemies in a lawful War, where the Law of Nations is the Guide of our Actions; yet *as Men* they have a *natural* Right to the Performance of Contracts and Agreements. Thus *Diodorus* relates that *Lucullus* kept Faith with *Appollonius* the Captain of the Fugitives, leſt the *public Faith* ſhould be violated; *fidem ſervis datam nunquam a quoquam Domino fuiſſe violatam.*

CHAP.

CHAP. V.

Of the LAWS *of particular States.*

THE Political State of Mankind is the Work and *Ordinance of God*; and this is the *Power* that is ſaid to be *ordain'd of God*; therefore *Rom.* xiii. thoſe who are Judges and Miniſters of Juſtice, becauſe they act in the Name of and for God, are call'd GODS, *Pſa.* lxxxii. 6. For which reaſon 'twas not improperly ſaid by Archbiſhop *Williams*, when Lord Keeper of *England*, in a Speech he made upon a Call of Serjeants, that *Lawyers* were the *Prieſts* of the Law, when they *offer'd* and preſented the Petitions of their Clients to the Court.

Tho' the Laws of all States are to be eſtabliſh'd upon the Rules of *Juſtice and Righteouſneſs*, it does not thence follow, that the *ſame* Rule of Juſtice muſt be obſerv'd by all Nations. For as Nations do differ in their Cuſtoms and Conſtitutions, ſo they may vary in their eſtabliſh'd Laws: For Bodies politic differ in their Conſtitution, even as natural Bodies; and we ſee

that even in the ſame State, different Provinces may have different Cuſtoms, and yet all founded on the *Rules of Equity*.

But there are ſome Laws of Juſtice that muſt be the ſame in all Nations, eſpecially thoſe Nations which have Correſpondence and Intercourſe one with another; and the Subjects of each Nation muſt have the ſame Meaſure of Juſtice with each other. 'Tis ſufficient in general that the Subjects of Foreigners be treated as the other Subjects, in Actions of the ſame Nature; But if any Queſtion do ariſe, after the End of any War, concerning the Seizure or Forfeiture of a Subject, during the Continuance of Enmity between the Nations, the Rule of Juſtice will be, to enquire how the Subjects of one Nation are treated upon the like civil Actions in the other Nation.

So if any Queſtions do ariſe between Subjects of the ſame Nation, about Matters that do not ordinarily come within the Cognizance of Civil and Criminal Actions, 'tis uſual to conſider, what is the general Senſe of other Nations upon the ſame Debates: As it happen'd ſome Years ſince, in one of our Courts at *Weſtminſter*, upon a Wager lay'd about the *Surrender* of a Town, where it appear'd that the Town had capitulated upon Terms and Articles; but the

Town

Town being diſtinguiſh'd into the Old and New Town, and one of them only being ſurrender'd, it became ſo nice a Queſtion, upon the Terms of the Wager, that the Judges would not determine the ſame, without firſt hearing the Opinions and Advice of *expert Generals* upon the ſame: For that, it being a Caſe *wholly new*, our Law-books did not furniſh ſufficient Reaſon for Determination of the ſame; and upon hearing of the *Generals*, the Court thought fit to give Judgment according to their Explanation.

I was of an humble Opinion, that the like Queſtion had been proper to have been determin'd, upon the Trial of the Gentlemen lately taken at *Preſton*. For they having ſurrender'd themſelves upon a Treaty, and the Terms of that Treaty being expreſs'd after the ſame Manner as is uſually done in Warlike Capitulations, I adviſ'd Mr. *Duncan Mackintoſh* (Btother to the Brigadier of that Name) to ſummon ſome of our able and experienc'd Generals; and accordingly, they courteouſly attended the Trial, ready to give impartial Teſtimony: But upon my opening that Part of the Defence, the learned *Chief Juſtice*, with ſome Emotion, interrupted my Attempt to defend my Client on that Head, as *trifling and impertinent*.

I ſhould have been better ſatisfied, if the Court had vouchſafed to hear my poor Reaſons, and have afterwards anſwer'd them by their own learned Arguments: And I muſt needs ſay, if ſo nice a Queſtion had been debated and determin'd in a Judicial Manner, it would have very much ſilenc'd the various Opinions and Miſtakes throughout the Nation on that Subject; for it being the firſt Queſtion of that kind, that ever came before any of our Judicatures, 'twas very proper it ſhould have had a Deciſion in a Judicial Way.

I was the rather induc'd to put the Defence of my *Client's Life* upon this Queſtion; becauſe, by my Converſation with the Priſoners, I found they all underſtood this Capitulation to amount to an *Indemnity*, and that the ſame was not a Surrender to *Juſtice*, but to *Mercy*.

For our Law makes a Difference between a *Surrender to Juſtice* and a *Surrender to Mercy*. In the firſt, the Party always takes his Trial (as lately happen'd to General *Maccartney*;) in the latter, the Party always partakes of that which he ſubmits to: Which is the Caſe of thoſe *Felons* who ſurrender themſelves and become *Approvers*; or of thoſe who lay down their Arms, and ſubmit to the King's Proclamation.

But

But I was the more confirm'd in my Reaſon for this Attempt, becauſe I found the *Gazette*, which is publiſh'd by Authority, did very little vary from what the *Brigadier* had inform'd me; which is in the Words following, *viz.* 'From *Tueſday*, '*November* 22. to *Saturday*, *November* 26. '1715. On *Sunday*, *November* 13. Gene-'ral *Carpenter* arriv'd with the Regiments 'of *Cobham*, *Churchil*, and *Moleſworth*, 'about 12 a Clock. At 2 in the After-'noon the Rebels ſent out one of their 'Officers to *Capitulate:* Upon which, Ge-'neral *Wills* ſent Lieutenant-Colonel *Cot-'ton*, his *Aid-de-Camp*, into the Town, to 'acquaint them, that he would give them 'no other Terms than that of Priſoners at '*Diſcretion*; and that they muſt ſubmit to 'the King's *Mercy*. The Heads of the 'Rebels told Colonel *Cotton*, that there 'were ſome Diſputes between the *Engliſh* 'and the *Scotch*; but they hop'd, if the 'General would grant them a Ceſſation of 'Arms, till the next Morning at Break of 'Day, that they ſhould be able to ſettle 'the Affair, as he commanded.

'After Col. *Cotton* had carried *ſeveral* '*Meſſages*, the General agreed to it; *pro-'vided* that they ſhould *make no Works* 'in the Town, nor ſuffer any of their

'People

'People to escape. Col. *Cotton* brought 'out Lord *Derwentwater* for the *English*, 'and *Mackintosh* for the *Scotch*, as *Hostages*, 'that what was demanded should be com-'ply'd with.

'At break of Day next Morning, the 'Rebels *submitted to the King's Mercy*, 'and Col. *Cotton* was sent back to take 'Possession of the Town, and to order 'the King's Troops to march in, to *disarm* 'the *Rebels*; which was done accordingly.'

I offer'd to appeal to those Letters in the Secretaries-Office, from whence this Account is extracted; and I doubt not, they would have made full Proof of what I insisted upon.

But however, the *Gazette* itself contains what I most desired to prove, *viz.*

1. That there was a Treaty.

2. That several Particulars were therein agreed.

3. That there was a Submission or Surrender to *Mercy*.

And if the Treaty had gone no further than that of a Treaty with *Rebels*, the General should have condescended to no other Terms than that of giving *Quarter*.

I must confess, the Question I would have had debated, is of the *nicest* and *tenderest* Importance; and might, perhaps, have

have taken up much Time to have diſcuſſed; and would have made the Trial more prolix than it was: But,

Nulla unquam de morte Hominis cunctatio longa eſt. Juv.

And ſince the Queſtion of Surrenders was not allow'd to be debated, in the Method of Trial, I hope ſome learned Hand will undertake the Vindication, of the Juſtice of the Nation, on this Head. I profeſs myſelf, at all Times, ready to juſtify the Honour of my Country, and its Laws; but this Subject requires the Performance of a learned and judicious Hand. Foreign Nations, who have heard of the late Proſecutions, have been very free to cenſure them: And I hear, we are like to ſee the Certificates of *French*, *German*, *Spaniſh*, *Dutch*, and *Italian* Generals, and Lawyers, as ample Teſtimonies againſt the prevailing Opinion. And it is not a Matter of ſlender Import, to vindicate the public Juſtice of a Nation: For by the Opinion and Eſteem, which Foreigners have of our public Honour, the Nation will be more or leſs reſpected; which is of great Importance to thoſe who are concern'd in Traffic. I remember the late Lord Chief Juſtice *Holt* thought

thought the public Credit of the Nation concern'd in the Adminiſtration of its Juſtice: This I heard him expreſs, with ſome Warmth and Zeal, upon Occaſion of a Verdict of ſmall Damages, given to repair the Honour of one of the greateſt Peers in the Kingdom, the late Duke of *Norfolk*. He told the Jury, *that the Fame of their Verdict would reach the Ears of Foreign States, and render the Adminiſtration of our Juſtice ridiculous.*

CHAP. VI.

Of the LAWS *of* WAR.

THOSE who ſee, and conſider the miſerable and direful Effects of War, will hardly think, that 'tis guided and govern'd by any Rules of Right or Wrong; and are ready to think, Mankind are then devolv'd into a State of mercileſs and ſavage Nature: But however, War, as limited by the Rules and Practice thereof among civiliz'd *Nations*, is not ſo terrible, as that which is undertaken by barbarous and unciviliz'd Nations.

Princes

Princes having no other Methods of enforcing Juſtice from each other, muſt have Recourſe to Arms: And this is an Appeal to God, the Supreme Judge and Avenger of thoſe that are oppreſs'd; and has ſome Reſemblance to thoſe civil Conflicts between private Perſons, who appeal to Judges and Magiſtrates for Redreſs of Injuries. The Quarrels proceed from the ſame Grounds; *viz.* An Opinion of Wrong and Injuſtice of the adverſe Party: But Princes having no Superior to appeal to, are therefore oblig'd to attempt that by Force which others attempt by civil Actions.

Therefore thoſe States which intend nothing by a War, but the Reparation of Injuries, do forbear Hoſtilities and unfair Ways of proceeding, which tends rather to the Deſtruction of Mankind, than the obtaining of thoſe Ends for which they make War.

For this Reaſon, wiſe and juſt Princes do conſider, before they make War, whether the Cauſe for which they undertake it be juſt and lawful? And being perſuaded of the Juſtice of their Cauſe, they reſolve to purſue it by all juſt and lawful Methods; and therefore ſtated Rules have been agreed upon, to prevent that Ravage and Barbarity which would naturally enſue upon an unli-

mited War; and this is call'd the *Law of Arms.*

And thoſe who on either Side do tranſgreſs theſe Laws, do juſtly expoſe themſelves to that Vengeance which is uſually retorted upon the Tranſgreſſors. Therefore between foreign States at War with each other, a *Cartel* is commonly ſettled for Exchange of Priſoners, to prevent the Hardſhips and Barbarity which would in all likelihood be ſhewn to Captives: For every Victor having a Right to the Lives and Liberties of his Captives, is reſtrain'd from the Exerciſe of Inhumanity and Barbarity towards them, by the Rules of War, which are regulated by the Law of Nature and Nations; whereby we are taught, not to triumph over the Miſerable, or exerciſe any Cruelty towards them.

The chief Laws, obſerv'd during the Courſe of War, may be reduc'd to theſe four; *viz.* ' 1. To treat with Humanity, ' thoſe that are taken Captives, or have ' *ſurrender'd:* And there fore 'tis ſaid to be

Jovius. ' *Factum contra Jus Belli cum* ' *Victores in ſupplices & ſe de-* ' *dentes ſæviunt, quibus condo-* ' *nare cum Humanitatis tum leges Militiæ* ' *dicuntur*; *i. e.* 'Tis againſt the Law of ' War, to fall upon thoſe who *ſubmit* and ' *ſurrender*;

'*ſurrender*; whom the Laws of Humanity and War do require ſhould be ſpar'd. '2. When Women and Children are put 'to Death; as was practis'd by the *Traci-*'*ans*, when they took *Mycaleſſum*; and by 'the *Macedonians*, when they took *Thebes*. '*Alexander* us'd to ſay, he did not *make* '*War with Women:* And *Camillus* ſaid, he 'did not make War with that Age, which 'is even ſpar'd, when a City is taken by 'Storm. 3. The Law of War requires 'that Time be allow'd to bury the Dead. '4. Holy Places, Altars, and Sepulchres, 'are to be ſpar'd.' And to theſe I may add, the ancient Practice of the *Romans*, not to injure the Huſbandman.

If theſe Rules are tranſgreſs'd on either Side, 'tis uſual to make Repriſals for the Injury, by denying of *Quarter*, in Time of *Battle*, to the oppoſite Side.

If Treaties or Articles be broken, 'tis the Practice to take Vengeance of the Trucebreaker, by Fire, and Ravage of his Country; and ſometimes 'tis allow'd to break Articles and Capitulation, by way of Repriſal, for Breach of *Public Faith*. Thus King *William*, after the Capitulation of *Namur*, made Repriſals, by ſeizing Marſhal *Boufflers*, even while he was marching out of the Town, at the Head of his Forces,

purſuant

purſuant to a Treaty of Capitulation; till ſuch Time as he obtain'd Satisfaction for ſome of his own Troops, detain'd by *France* contrary to the Practice of War.

By Means of theſe Laws of War, the Ravage and Deſolation of Countries is prevented; till ſuch Time, as by the Progreſs of War, fairly manag'd, ſome manifeſt Advantage inclines one ſide to offer Terms of a ſafe and honourable Peace; whereby the contending Nations are reſtor'd to their former Tranquillity.

The *Turks* (whom I ſcarce reckon among civiliz'd Nations) do vary in their Practice, from other civiliz'd People, for they always manage their Wars with Blood and Cruelty; and tho' they ſpare the *Lives* of their Captives, do, nevertheleſs, ſell them for Slaves, or hold them in cruel and rigorous Bondage.

The *Indians*, who know nothing of civil Polity, do carry their Rage to the utmoſt Extremity; and having gain'd Priſoners by their Arms, do ſport themſelves over their Captives by extreme Cruelty and Torture; and, like wild and ſavage Beaſts, tear in Pieces their poor captivated Prey.

But the Laws of War forbid theſe Practices, eſpecially among Chriſtians; and teach, that nothing is to be attempted, but what may

may conduce to the End of War; *viz.* the obtaining Juſtice, and ſettling a good Correſpondence, among the States at Enmity, by eſtabliſhing a ſafe and honourable Peace.

CHAP. VII.

What WAR *is.*

THE Word *Bellum* is an Equivocal Word, and taken in ſeveral Significations; but my preſent Purpoſe is, only to define War in its proper and natural Senſe, as it is a State of Hoſtility. *Cicero* defines War to be *Certationem per Vim*; others define it from the old Word, *Duellum, quaſi Bellum duorum*; and others again define it *a Belluis quod perpetua ſit diſſenſio belluarum:* But the true Definition is this, *Bellum eſt diſſidium duorum contrariorum exercituum*; i. e. *War is a Contention between two oppoſite Armies.* This ſeems to be pretty much the Senſe of our *Engliſh* Laws: Therefore, the ſame Statute which makes it Treaſon *to levy War againſt our Lord the King in his Realm*, has provided, that every Riſing in Arms, Gr. L.

Arms, ſhall not be adjudg'd Treaſon. For if, *percaſe a Man ride arm'd, openly* [diſcouvertment] *or ſecretly, with Men of Arms, againſt any other, to ſlay him, or rob him, or take him, or retain him till he hath made Fine or Ranſom, for to have his Deliverance; it is not the Mind of the King nor his Counſel, that it be judg'd Treaſon, but it ſhall be judg'd Felony or Treſpaſs, as the Caſe requireth.* There is no Difference between Treaſon and Felony, as to the Conſequences; ſave, that the Execution is more cruel, to ſignify the Heinouſneſs of the Offence.

All human Laws, eſpecially thoſe that relate to Capital Offences, are to be judg'd as near as may be according to the *Letter* of the Law (tho' the Excellence of Divine Laws is beſt underſtood in their refin'd and Spiritual Senſe.) This, in well-order'd States, prevents and ſecures them from Arbitrary and illegal Sentences. I could name ſeveral Laws in *England* that have loſt their Force thro' Gloſſes and Interpretations; and 'tis eaſy to trace their Gradation to the firſt Caſe that departed from the Letter of the Law: For, if once Way be given to Gloſs and Interpretation, and to the humorous Fancy of Wit and Argument, the Subſtance and Eſſence of the Law is loſt. Not that I deny there may be a proper Occaſion

ſion to expound a Statute; but this I affirm, that every Caſe ſhould be adjudged as near the Letter of the Law as may be: For we have often ſeen the Miſchief of a contrary Liberty, which cauſes a continual heaping of Volumes to amend and alter the Law: But if any Senſe or Interpretation be allowed, it ought to be in Favour of the Life and Liberty of a Subject.

Every *Inſurrection* or *great Riſing* was not accounted Rebellion or levying of War; tho' great Outrages and Acts of Hoſtilities ſhould be committed, ſuch as burning and ſpoiling of Towns, Villages and Houſes, which in all Appearance carry the Face of a Rebellion, and are certainly the Forerunners of it: But ſuch Offences are now by a late Statute made Treaſon, tho' heretofore, in the Counties of *Cumberland*, *Northumberland*, *Weſtmorland*, and Biſhoprick of *Durham*, they were only accounted Felonies, 43. *Eliz.* cap. 13.

Our Laws appoint ſeveral Puniſhments to Offenders, according to the ſeveral Gradations of Offences. Pirates and Robbers are public Enemies to a Kingdom, and live in a ſort of Hoſtility by their Murders and Plunders; yet their Offences are only to be adjudged Felonies, and not Treaſon.

Riots, Routs, unlawful Aſſemblies, and Inſur-

Inſurrections do ſo reſemble a War, that the Difference lies but in a *Point*; and the Diſtinction between an Inſurrection and a Rebellion is ſo ſmall, that it requires a nice Judgment, to diſtinguiſh between one and the other. The Statute which 25. *Ed.* 3. makes it Treaſon to *levy War*, has made that Diſtinction, which is to be the Rule of Juſtice: And ſome Statutes, ſince that Time, have appointed what ſorts of Puniſhments ſhall be inflicted on thoſe who make *Inſurrections, or great Riſings, Riots, Routs, or Aſſemblies, in diſturbance of the Peace, or of the common Law, or in a Fray of the People.* 15 *Ric.* 2. cap. 2. & 13. *Hen.* 4. 7.

Theſe Statutes do relate to a *Public* and not a *private* Wrong, and yet have only the Puniſhment of *Fine and Ranſom* annexed to them. I know the Statute of 15 *Ric.* 2. is call'd a Statute of *forcible Entry*; but nevertheleſs, the making of *Inſurrections, or great Riſings*, &c. is added as a particular Offence: But it comes ſo near the Offence of Rebellion, that I ſcarce know how to diſtinguiſh them, unleſs ſome particular Circumſtances, or previous Conſpiracy, prove the Intention of making War on the Crown.

And is it not proper for thoſe, who are engag'd

engag'd as Counſel, to defend the preſent Proſecutions, to conſider, whether the Offence, for which the Priſoners ſtand indicted, be well prov'd? And whether the Proof does amount to *levying of War?* Or whether the ſame be not more properly reducible, to the heinous Crimes of Riots, Routs, and unlawful Aſſemblies?

CHAP. VIII.

Of REBELLIONS, *and the Way to prevent them.*

IT would be endleſs to deſcribe the various Cauſes of Rebellion: But this muſt be agreed, that they ſeldom proceed from *Hatred to the Prince's Perſon*; and commonly thoſe who riſe in Rebellion, do give other Cauſes of Reſiſtance, and do often expreſs great Duty and Veneration for the Prince himſelf.

There are never wanting Incendiaries, in moſt Kingdoms, to raiſe and foment the Spirit of the People, by ſuppos'd Grievances; and Pretences of Male-adminiſtration

are never wanting to ſupport the Injuſtice of Rebellion.

This we find has been the Practice of all Revolutions of Government, and there is hardly any Hiſtory void of the Examples of it. We are told, that when *Abſalom*'s Ambition prompted him to depoſe his Father, the firſt Step he made, was to inſinuate, that his Father's Adminiſtration was not juſt, and that his *Judges* were *corrupt*; but that himſelf would not deviate from the Rule of Juſtice, but would *ſuum cuique tribuere*, and thereby preſerve the Liberty and Property of the People: For which Reaſon, he would often expreſs his Wiſhes to be made a *Judge*. This was a rare *Innuendo* to the Populace, to make him the Chief Magiſtrate, and ſo commence a Rebellion againſt their Lawful Sovereign, who had been appointed by God himſelf. But there is another ſecret and black Way of raiſing Rebellions, by private Whiſpers and Rumours. This Method ruin'd the beſt of Monarchs, King *Charles* I. For tho' he was the moſt Gracious and pious Prince that ever ſat on the *Engliſh* Throne, yet by vile Slanders and Calumnies, he was render'd the moſt odious and infamous; and when the Rebels had painted him as black as themſelves, they wanted not the

Inſtruc-

Inſtruction of a Heathen Author how to diſpoſe of him;

Victima haut ulla amplior
Poteſt magiſq; optima mactari Jovi
Quam Rex iniquus. Senec. *Trag.*

It muſt be confeſs'd, that when a Prince gives himſelf up to oppreſs and Tyranniſe over his People, or is ſo indolent, as to permit his Miniſters to vex and enſlave them, no Ties of Duty and Allegiance, no reſtraint of Laws, nor Obligation of Conſcience, will ever keep them within the Bounds of Obedience; but they will, at the greateſt Hazard, and Expence of their Lives and Liberties, endeavour to extricate themſelves from real or ſuppos'd Hardſhips.

The common Pretences for Inſurrections, proceed ſometimes from Inequality of Adminiſtration in the Prince, when he permits ſome one or few Minions to engroſs his Favours; or when he abridges them of their juſt Rights and Privileges, and oppreſſes his People by heavy and inſupportable Taxes.

The rigorous levying of Taxes (how juſt I will not now enquire) has often prov'd the Beginning of a Rebellion; and the Inſolence of one Toll-gatherer has ſet the Kingdom

Kingdom in a Flame, and threaten'd the Overthrow of the Conſtitution. This had like to have rais'd a new Rebellion in *France*, ſince the Concluſion of the laſt Peace; and did heretofore, raiſe the formidable Rebellion of *Wat Tyler*, and *Jack Straw*, in our own Country.

I will not at this Time examine what ſort of Government is beſt conſtituted. I take it for granted, that all ſorts of Governments are abſolute and Deſpotic, whether the ſame be veſted in *one*, or *more*: For whoever has the Power of making, altering, or repealing of Laws, is under no reſtraint from enacting whatever he thinks may conduce to the Ends of Government: But this ought to be the Care and Maxim of all States, that Laws be enacted *for the equal Benefit of all, and that ſtrict and impartial Juſtice be adminiſtred to every Man.*

That Maſter of a Family who would live eaſy and happy, muſt eſtabliſh his Domeſtic Affairs, upon the true and juſt Reaſons of *OEconomics*: He muſt ſettle the Rules of Peace and Friendſhip among thoſe under his Care; muſt prevent all Quarrels and Inſults, from one to the other; muſt not ſuffer any one to domineer over the reſt, or allow one Tale-bearer to perplex him with *Peccadillo* Grievances: He muſt connive

nive at ſmall Faults, and puniſh great ones; and muſt ſuffer no one under him to give ill Impreſſions or Jealouſies of the reſt: For if a Chambermaid do but ingroſs the Ear of her Miſtreſs, the whole Family-Adminiſtration is perverted.

Kingdoms and States are large Families, of which the Prince is chief Ruler or Head: And therefore it ought to be the Prince's Care to prevent Factions, to heal them if they ariſe, and to compoſe thoſe Differences that may diſorder his Kingdom: He muſt ſhew himſelf to be *Pater Patriæ*, and not the Head of a *particular Faction*; he muſt conſider, that all under his Rule are equally his Children and Servants; and if he ſuffer one Faction to oppreſs the other, he muſt expect that the Fermentation will end in State Convulſions: He muſt be ready and free to hear the Complaints and Oppreſſions of his People, and not ſuffer particular Favourites and Minions to ingroſs his Perſon, and ſtop that free and open Acceſs and Addreſs to him, which is requiſite to give him a juſt Information and Knowledge of the State of his Dominion, and the Condition of his People.

Theſe are, *in ſhort*, the Rules of a wiſe and juſt Government; and it would be needleſs to enlarge on the Particulars: But what-

whatever Prince intends to reign happily, and prevent Diſorders in a State, muſt manifeſtly make it appear, that he is a Lover of *God*, and will eſtabliſh Rules of impartial Juſtice, and ſettle his Adminiſtration upon equal and juſt Principles.

CHAP. IX.

Of TREATIES *with Rebels.*

SOME People have been of Opinion, that 'tis wholly derogatory to the *Honour* of a Prince to enter into any Treaty with rebellious Subjects: But *Events* have prov'd the contrary to be true. For ſometimes Deſpair has added Force to a deſpicable Army, and the Time that has been ſpent in reducing Rebels, has very often prov'd fatal to thoſe that deſpiſed them; and Rebels, by Procraſtination, have gain'd that Aſſiſtance which made them formidable to a State, and which has ſometimes overthrown it; therefore *Venienti occurrite Morbo* is as true in *Politics* as 'tis in *Naturals*.

The preſent State of the *Dutch Republic*

is

is a full Evidence againſt the Truth of ſuch a haughty Maxim in Politics. For they having *rebell'd* againſt the *Auſtrian* Family, on the Score of ſome Privileges which were deny'd them, would have gladly ſubmitted themſelves upon a Treaty for Reſtoration of their Rights and Liberties: But their Sovereigns thought Diſdain to enter into a *Treaty with Rebels*; by Means whereof, they ſpent immenſe Treaſures in order to reduce them by Force, and not only loſt innumerable Loyal Subjects who periſhed in that Service, but were thereby ſo weaken'd, that, beſides the Damage they ſuffer'd from their own Subjects in Rebellion againſt them, they became a Prey to the *Engliſh* and other foreign Nations; and at laſt were forc'd to acknowledge their *Rebel-ſubjects* as a *Free State*, and thereby gave up the entire Sovereignty over them, and are now forc'd ſometimes to ſue unto them for *Allies*.

The ſame haughty Maxim took Place in the Civil Wars of *France*. For, when the late King's Forces ſeiz'd any of the Prince of *Conti*'s Soldiers, they hang'd them up as Rebels: But the Prince of *Conti*'s Forces making Repriſals of the ſame kind, the King's Forces refus'd to ſerve upon ſuch a double Hazard, either of dying in Battle, or of being executed if taken Captive: Upon which,

which, both Sides ſubmitted to the Law of War, which otherways would have produc'd nothing but ſavage Murders and Cruelties, which might have ended in the Deſolation of their Country.

Where Princes refuſe to treat with Rebels, they ought to be well aſcertain'd of the Succeſs of their Arms; as Queen *Elizabeth* was, when ſhe refus'd to treat with her Rebels of *Ireland*, and refus'd to grant Terms or Conditions to thoſe Foreigners who came to their Aſſiſtance, as being involv'd in the ſame Crime of Rebellion: And yet it may be juſtly doubted, whether Aliens, aſſiſting Rebels, are to be reckon'd guilty of their Crime, and are to be puniſh'd as *Rebels* by the Law of their Country; and there are diverſity of Opinions in this Matter: For there are ſome who count that no Man can be a *Rebel* but he that is a Subject; others think, that whoever join with Rebels are partakers of their Guilt. I will not determine of a Particular, or a few Perſons, for ſuch our Law has directed in what Manner they ſhall be indicted; but it ſeems to be otherways in arm'd Forces of Aliens, who join Rebels by Conſent or Connivance of their own Prince, tho' without a Denunciation of War: And I ſuppoſe, that Queen *Elizabeth*, by permitting her

her Subjects to aſſiſt the States of *Holland* in Rebellion againſt their Sovereign (even while ſhe had Amity with him) did not think ſhe expos'd her Subjects to the Penalties of Treaſon, in permitting them to join with Rebels. However, by the Laws of Nations ſhe may be juſtify'd therein: For the *Lex Talionis* is a Part of that Law; and ſhe might do it by way of Repriſal for the Aſſiſtance that was given by the Houſe of *Auſtria* to the Rebels of *Ireland:* Tho' the Generoſity of *Camillus* is much more commendable, in ſending back to the *Faliſci*, a Traytor (who having the Tutelage of ſome Noble Youths, betray'd them into the Enemies Camp) with this handſome Sarcaſm: *Eos tu, quantum in te fuit, novo ſcelere viciſti; Ego* Romanis *artibus, virtute, opere, armis, ſicuti* Vejos, *vincam.* Liv. lib 5.

'Tis true, that the State of *Subjects* at Strife with their *Sovereign*, differs from that of *Foreign and independent States* at War with each other: But then, the Rules of Reaſon and good Policy do require, that care ſhould be taken how the State is weakened; for not only the beſt Subjects are loſt, who periſh on the Sovereign's Side, but the State receives Diminution, even in the loſs of the worſt Subjects.

Beſides, Subjects, once poſſeſſed with the Spirit of Deſpair, do fall to committing horrible Outrages and Barbarities, which in a little Time deſtroy more Souls than are like to ſuffer in a long and regulated War: Therefore wiſe and merciful Princes, who conſider the Good of their Country, have always endeavour'd to put an End to the Commotions of their Kingdoms with what ſpeed they can. But then this is beſt effected with Sword in Hand, and after ſome manifeſt Advantage gain'd over the Rebels: For this beſpeaks Grace and Condeſcenſion in the Prince, and engages the Duty and Affection of the Subject, to more laſting and durable Ties of Duty and Gratitude.

It muſt be confeſſed there are ſome Subjects who grow obdurate by the Condeſcenſion of the Prince, and will riſe in their Demands, in Proportion to the Eaſineſs and Goodneſs of their Sovereign. This happen'd to be the Misfortune of King *Charles* I. For, tho' he was ſo wiſe and gracious, as willingly to enter into Treaty with his Rebel-Parliament; yet he had to do with People who would be content wih no juſt Terms of Reconciliation; but, under the ſpecious Pretence of rectifying *Grievances*, always form'd ſome new Propoſal which themſelves knew to be unreaſonable;

ſonable; intending to be ſatisfy'd with nothing but the Blood which they afterwards drew from him.

However, this will not deter wiſe and good Princes, in the Beginning or Progreſs of Commotions, to Treat with their Subjects, and allay that Calamity which diſturbs or threatens the Overthrow of the *State*, before the Wound become incurable: For the Example and Experience of all Ages do prove, that the meaneſt Enemy is not to be deſpiſed; and that Subjects driven to Deſpair do often become formidable to the State. It is a true Maxim, *Nihil in Bello oportere contemni:* And *Cornelius Nepos* relates, that the greateſt Advantage which *Thraſybulus* had, to recover the Liberty of his Country, was, that his Enemies deſpiſed him, and by that Means he gathered Strength to oppoſe their Uſurpations, and at laſt effectually accompliſh'd his Deſign.

CHAP. X.

Of Capitulations and Surrenders to Mercy or Diſcretion.

HEretofore Wars were almoſt as ſoon ended as begun: For, before the Method

Method of Intrenching and Fortifying of Towns was known, 'twas uſual for two Armies to meet in the Field, and by one deciſive Blow to finiſh the Quarrel.

But, ſince War has been reduced to *Art* (I may add *Science* too) it has been found neceſſary to reduce Towns and fortified Cities to Obedience, before 'tis thought ſafe to venture too far into an Enemies Country; tho', before the Uſe of Guns, Garriſons were not of ſo great Conſideration: For the *Romans* did not ſpend their Time in reducing of Cities, if they had a fair Opportunity of engaging an Army with any Probability of Succeſs; for they knew the Fortreſſes muſt of Courſe fall into their Hands.

However, in the Management of modern Wars, the contrary Practice has prevailed; and 'tis not thought ſafe to leave fortified Cities in the rear: Therefore, great Time is ſpent in reducing them; which makes the Continuance of Wars more laſting than otherwiſe they would be.

This Practice has introduced various Sorts of Treaties and Capitulations, according to the Nature and Strength of the Town which is beſieged. If a Town be in common Eſtimation impregnable, the Conditions granted upon *Surrenders* are more

more or leſs Honourable: But if a Town be of inconſiderable Strength, and the Inhabitants will take upon them unneceſſarily to defend the ſame, when they have no Probability of Succours to relieve them, or ſufficient Force within to defend a Siege, and will give the Aſſailants unneceſſary trouble to attack the ſame, with the loſs and hazard of their Soldiers, 'tis uſual to hold them to ſtraighter Terms and Conditions.

For the End of War, eſpecially among *Chriſtians*, being to obtain equitable and juſt Terms of Peace, the Laws of War require, that they ſhould effect and compaſs the ſame with as little loſs of Blood as may be.

The loweſt and ſtricteſt Terms of *Surrender* are thoſe at *Diſcretion and Mercy*; which are ſeldom inſiſted upon, unleſs a Town hath given unneceſſary trouble to the Beſiegers, by holding out to the laſt Extremity: And in ſuch Caſe, if the Town be of inconſiderable Force, the Juſtice of War requires, that ſome of them be Executed by *Martial Law*, to deter others from giving the like Trouble; and ſometimes, tho' rarely, ſome one *Deſperado* (who has been active in the Defence) is immediately put to Death, to ſtrike a Terror into others who would attempt the like Practice;

practice; and this in the Heat of Action, upon the first Surrender, and to prevent the unnecessary Effusion of *Christian* Blood.

But 'tis against the Practice and Usage of all Nations, to take away the Lives of Surrenderers *in cold Blood*, as they call it; and now 'tis reckon'd Dishonourable, after the first Heat, to do Injury to the Lives of Captives, even tho' the Submission be in the open Field.

This the common Practice of *Humanity* requires from us, and proceeds from that innate Generosity and good Nature, which God has implanted in our Natures; and is part of that Divine Law, by which he has commanded us not to execute Vengeance upon our Enemies.

An Instance of this good Nature, we find recorded in the Scriptures: For when the King of *Syria* had sent an Army into the King of *Israel*'s Country, and they had been miraculously led by the Prophet *Elisha*, into the midst of *Samaria*, the King of *Israel* was inclin'd to take Vengeance on them; and would have smote them with the Sword; but the godly Prophet inform'd him better, that 'twas against the Law of Nations, and contrary to Humanity, to smite even those Enemies, who were taken Captive in Battle; much less those who now

now perceiv'd their Error, and were ready to ſubmit to *Diſcretion and Mercy*: Therefore he adviſes the King to that Practice which is fit to be imitated by *Chriſtians*, *To ſet Bread and Water before them, that they might eat and drink, and return to their Maſter.* 2 *Kings* vi. 22.

The *Romans* are by all Hiſtorians, reckon'd a brave and glorious People; and they always practiſed this Humanity towards thoſe, who were either captivated by them or ſurrendred themſelves to them.

The *Faliſci* had often rebell'd againſt the *Romans* with ill Succeſs, but at laſt, were oblig'd to ſurrender. The People of *Rome*, were very much inclin'd to torment and execute them; but the Wiſer ſort reſolv'd, that no ſuch Proceedings ſhould be had, becauſe by ſuch *Surrender*, they had not only committed themſelves to the *Power*, but the *Honour* of the *Romans*.

Diodorus Siculus relates, that after the Army of the *Athenians*, had been overthrown by the *Syracuſians*, it was debated, what ſhould be done with the Priſoners. Some were for putting them to Death, but thoſe who underſtood the Laws of War, and Practice of Humanity, adviſed the contrary, becauſe they had *ſurrendred themſelves*

ſelves and their Arms, truſting to the Clemency of the Victors; For, ſay they, *'twill be a ſhameful Thing to deceive them, with the Hopes of our Humanity. Si quis ſe remittat bonæ Gratiæ alterius, non poterit corporaliter offendi, i. e.* If any one ſurrender to the *Diſcretion* of another, he is not to be corporally puniſh'd: *Et qui ita ſe committit, cenſetur tacite actum quod fiat gratia, atq; idem eſſe ſi ſe ſubmittat alterius voluntati:* And he who thus ſubmits, does make a *tacit Compact* for *Mercy*, and 'tis all one, if he had ſubmitted to his Will and Pleaſure; and therefore 'tis utterly unlawful, that ſuch ſhould *furcis ſuſpendi aut ad triremes deportari*, for Diſcretion implies *arbitrium boni viri.* And all Writers of the Laws of War do agree, that it does at leaſt imply the Preſervation of Life: And 'tis the ſame Thing, whether a Man ſubmits to *Wiſdom, Diſcretion, or Mercy*; the Words are *Sapientiæ, Moderationi, Miſericordiæ, —— Hæc omnia apud* Romanos *idem valent.*

Zouch de jure fec.

But to come nearer to the Caſe of Subjects, rebelling againſt their Sovereign; for, even in that Caſe, *Faith is to be kept with Rebels*, tho' as *Grotius* ſays, *their Caſe is aggravated by the Injuſtice of their Cauſe, and*

and wickedneſs of Reſiſtance, ſo that their Offence deſerves to be grievouſly puniſh'd: Tamen ſi quoſi cum Deſertoribus actum ſit, pœna promiſſo opponi non poteſt. i. e. If there be *Quaſi actum, (a Sort of Treaty) with Deſerters and Rebels, they are not to be puniſh'd contrary to Promiſe*; for every Treaty, and Surrender thereon, implies a Promiſe to preſerve Life: And this is the conſtant and daily Practice with Deſerters, who return to their Colours upon Invitation, and Notice in the *Gazette*; and they are never call'd in Queſtion upon their *Surrender*, tho' no expreſs Words of *Pardon* do intervene. Lib. 2. c. 19.

There was a ſort of People among the *Romans*, who had often revolted, and rebelled againſt them, and had as often ſurrendred to *Mercy*, ſo that they got the Name of *Dedititii*, i. e. *Surrenderers*: But theſe People being at laſt totally ſubdued, had their Lives ſpared, and ſome ſort of Imaginary Liberty left them; tho' a Law was made, to abridge them the Liberty of *Roman* Citizens, and a Mark of Infamy was ſet upon them. *Calvini* Lex. Jur.

And the Reaſon of this is plain; for *Faith is to be kept with all Sorts of Enemies*, Subjects as well as Foreigners: For *Fides*

ſupremum rerum humanarum vinculum, ſacra laus fidei inter hoſtes. i. e. Faith is the chief Bond of human Society, and Faith is ſacred, even among Enemies.

Sande, Lib. 1. 'Tis obſerved by a *Dutch* Hiſtorian, that in the Beginning of the Tumults of *Holland*, nothing contributed more to the Eſtabliſhment of the States, than the *fierce Cruelty* of the *Spaniards*, towards the Inhabitants of *Zutphen*, and *Narden*; for they *puniſh'd* all without Diſtinction, whether they had *ſurrendered*, or had been *ſubdued:* Therefore thoſe who ſtood out, thought it more Glorious to die in Battle, than to periſh with Infamy; and thereby recover'd the Liberty of their Country. And the Hiſtory of the *Maccabees*, is a fair warning to Princes, how they drive Matters to the utmoſt Extremity with their Subjects: For the *Jews*, having ſubmitted themſelves to the Government of a Foreign King, *Antiochus Epiphanes*, he was not content to rule them by their own Laws, but endeavour'd to overthrow their Religion and Conſtitution; upon which enſued a dreadful Civil War, and the *Jews* at laſt freed themſelves from the Yoke of the Tyrant.

I will now conſider the Hiſtories of our own Country, which afford plentiful Evi-

dence,

dence, to prove the Matter in Hand; but I ſhall confine myſelf to thoſe Inſtances which are within the Memory of many now Living.

The aged Men of this Kingdom do remember the dreadful Civil Wars, in the Reign of King *Charles* I. But, during the Courſe of that Grand Rebellion, ſo much reſpect and deference was had to the Law of Nations, and Law of Arms, that no Priſoners were executed on either Side, during the whole Series of that Rebellion. We have an Account, that *Lilburn* was tried at *Oxford* for High Treaſon; but that was on Account of his being taken actually in Arms, on the Field of Battle: And I do not remember, that *Cromwell*, during his whole Uſurpation, ever attempted to bring into Judgment any Perſon that Surrender'd. 'Tis true, that after the Surrender at *Colcheſter*, he cauſed Sir *Charles Lucas*, and another Gentleman to be ſhot, by the Rules of Martial Law, becauſe, in a former Treaty, (as was pretended) they had broken their *Parol*, by appearing in Arms againſt the Uſurper: And *Penruddock* and *Grove* loſt their Heads at *Exeter* on the ſame Account.

The King himſelf, (tho' he had the juſteſt Pretences to puniſh Rebellion) thought

thought himſelf oblig'd to ſubmit to the *Laws of War*, and never attempted to bring any Rebel that ſubmitted, or ſurrender'd, before any of his Courts of Juſtice; but accepted their Surrender, as a full Attonement for their Offence, and never exacted the Forfeiture of Life or Eſtate. And his Lenity is remarkable, in ſparing the Lives of his *Subjects:* For when, at the Battle of *Brentford*, he had gain'd a ſignal Advantage over his Rebellious Subjects, and General *Ruthven* was purſuing the Advantage by Slaughter and Deſtruction of the Rebels, the King commanded him to forbear; *Cedentes violari vetuit, Cives enim Civibus parcere æquum cenſebat.* Upon which *Ruthven* ſent him Word, that if he did not made uſe of the preſent Opportunity entirely to reduce the Rebels, *they would ring Bells, and make Boneſires in* London, *for a Victory, and the next Day would make Head againſt him:* But the King having three ſeveral Times repeated his Meſſage, upon pain of Allegiance, *to ſpare the Blood of his Subjects*, the General was oblig'd to forbear the Slaughter; and the Event proved as he had foretold.

The Surrender of *Limerick* upon Articles, to King *William*, is an Inſtance, how far he thought himſelf oblig'd to obſerve the

Law

Law of Arms; for not one Gentleman was put to Death, on the ſcore of that Reſiſtance: Nay, I do not remember, that in all *Ireland*, any Man was offer'd to be Tried, after King *William* had ſubdued them.

And here it is not improper to mention the Conduct of King *James* II. in *Ireland*. His Troops had, it ſeems, ſeiz'd 200 Gentlemen, as they were going to join the *Inniſking-Men*, and they were immediately ſentenc'd to Death, (I ſuppoſe by Martial Law:) The Gentlemen made complaint, that they had *ſurrender'd* their Arms upon *Public Faith*, and that *ſome Conditions* were granted them, tho' they were not able to make Proof of any ſuch Terms of Submiſſion; however, none of them were executed, as may appear by the Certificate hereafter mention'd.

King *James* had in his Court, a faithful Servant, *William Bromfield*, a Quaker; who follow'd him into *Ireland* and *France*, and was eſteem'd a great Favourite to that Prince, having done him conſiderable Service; being the Projector of the Braſs-Money in that Kingdom, which he perſuaded that Unfortunate Prince to Coin, much againſt his Inclination. But however, he prevailed on him to do it, as the only Means of preſerving

ſerving that Nation from Free-Quarters of the Soldiers, which became very *grievous* to the Country; and he plainly told the King, *If Thou doſt not comply, the Kingdom in a little Time will not be worth the Prince of* Orange's *Conqueſt*. This *Bromfield* made uſe of his Intereſt with the King, to ſave the Lives of his Subjects, and to do them all the good Services he could, (a Practice very commendable in any States-Man) and having follow'd his Maſter into *France*, did lovingly adhere to him to his Death. But, ſome Years after, reſolving to return to his Native Country, to ſpend the remainder of his Days, he was, as ſoon as he arrived, committed Priſoner to *Newgate*, as a *Traitor* to the Government: But he knowing himſelf to be free from any Deſigns and Intrigues againſt the then Adminiſtration, in his *plain* Way, wrote a Letter to Queen *Anne*, not concealing his paſt Behaviour, and acquainting her with the true reaſon of his return, to the Effect following, *viz.*

Madam,

'I Have ſerved Thy Father faithfully, 'during his Life, and am now return'd 'to my Native Country to end my Days 'in Peace, under Thy Government; but 'am

'am committed to the noiſome Priſon of
'*Newgate*. If Thee haſt a mind to draw
'Thy Chariot-Wheels over Thy Father's
'Grave, Thou may'ſt put an End to this
'miſerable Life when Thou wilt; but if
'not, pray let me be freed from this loath-
'ſome Priſon.'

Thy Dutiful Servant,
WILLIAM BROMFIELD.

Upon which, the Queen immediately, of her *innate Goodneſs*, ſent him her Pardon; and underſtanding his Circumſtances were ſlender, order'd him a Bounty to ſupport his Neceſſities: Ever ſince which Time, he has demean'd himſelf peaceably, and inoffenſively, and lives now by his Induſtry, having made ſome Proficiency in Phyſic. But the *Gratitude* of thoſe *Iriſh* Gentlemen who were ſerved by his Intereſt, (when he had the Power of a *Favourite*) deſerves to be remembred in this Place: For they, hearing of his unfortunate Commitment to *Newgate*, did, (without any Application) ſend the following Certificate, as a true Argument, that thoſe who make a *juſt Uſe* of their Power in *Proſperity*, ſhall find Friends in *Adverſity*.

To whomsoever this Writing shall come,

'WE, the undernam'd Gentlemen do Certify and Acknowledge, that whereas above 200 of us received Sentence of Death at *Galway*, in or about the Year 1688, contrary to the *Public Faith* given us, and *Conditions* made with us in the Field, by about 2000 *Irish* then in Commission, under the late King *James*, on Account of our taking up Arms, and endeavouring to make our way thro' the Country, to join the Protestants of *Sligo* or *Enniskillin*, in order to assist in the late happy Revolution; that one Dr. *Bromfield*, now a Prisoner (as we hear) in *London*, who follow'd the said King *James* to this Kingdom, did appear for us, and did sollicite and procure for us several Reprieves from Time to Time (without any cost, fee, or reward that we know of) from his said Majesty; and so was one Means of saving our lives.

'Moreover, we hear and believe, that the said Dr. *Bromfield* did by his Interest, help, protect and deliver many other Protestants from the violence and rapine of that Time, and that he was extremely kind and useful to all that applied to him. All which, as many of us as are in this

'City,

' City, or can be met with on this Oc-
' caſion, do Certify and Acknowledge, in
' behalf of ourſelves, and the reſt of our
' ſaid Company, as witneſs our Hands;
Dublin, *Aug.* 16. 1711.

Tho. Purden.	*Tho. Southwell.*
Fra. Bernard.	*Tho. Peſonby.*
John Northcote.	*R. Foulke.*
Hugh Lawton,	*Robt. Conron.*
John Brookes	*H. Raymond.*
Ja. Graham.	*Wm. Southwell.*
Wm. Gunn.	*John Blenor-Haſſett.*
Nich. Chinnery	*Tho. Blenor-Haſſett.*

Cha. Northcote, Clerk.

But we will paſs from *Ireland* to the *Highlands* of *Scotland*; and there we find a Submiſſion and Surrender of the *Highlanders* (in the Beginning of the Reign of King *William*) to *Diſcretion*, without any other Terms or Articles; yet no Man was afterwards call'd in Queſtion on Account of *Rebellion*. 'Tis true, there was a great Violence and Outrage committed by the Soldiers on the chief Family of the Clan of *Glencoe*; in ſome ſort worſe than the Maſſacre of *Herod*: For there was a great Slaughter of Men, Women and Children, committed in Cold Blood at Midnight, and many driven to periſh in the Snow: But

the Action was diſclaim'd by the Govern-ment; and the Perpetrators of that *Villany* had in the utmoſt Deteſtation.

There was ſome Reſiſtance here in *England*, a little after the Revolution, by the Revolt and Mutiny of *Dunbarton's* Regiment: But no Man was put to Death after his Submiſſion or Surrender to General *Ginkle*, who told them the King was a *Merciful* King. It muſt be confeſs'd, that King *William* was inclin'd to have puniſh'd ſome of them; but that Honourable Ge-neral plainly told him, that if any were put to Death, who Surrender'd upon Hopes of *Mercy* given them by himſelf, he muſt throw up his Commiſſion.

I might enlarge upon the Hiſtories of Neighbouring Kingdoms, and ſhew, that in *France*, the Rebels of the *Cevennes*, and thoſe of *Catalonia* in *Spain*, were never brought before a Court of Juſtice on Ac-count of their being in Arms. But I muſt not diſmiſs this Subject, before I acquaint the Reader what is uſually underſtood by the ſeveral Terms of *Surrenders*.

A Surrender to be made *Priſoner of War* implies *Life ſaved*; the Priſoner keeps his Arms and Baggage, but is not allow'd to wear his Sword, 'till Leave be firſt aſk'd.

A *Surrenderer* at *Diſcretion* loſes his Arms

Arms and Baggage; but the laſt is, upon his humble requeſt, ſeldom denied to be reſtored.

Les Honeurs are thoſe Terms which are allow'd to Surrenderers upon Terms of *Honourable Capitulation*; ſuch as Drums beating, Colours flying, *&c.*

La Baguet blanche is a Privilege allow'd to Priſoners who return home: And they are permitted the Liberty of wearing a *White Staff*; which is a ſort of *Safe Conduct*, to protect them from the Inſolence of the Country through which they paſs.

This Law of War, which extends *Mercy* to thoſe that *Surrender*, is founded on the greateſt Reaſon: For if the Victor ſhould inſult and tyrannize over thoſe that ſurrender themſelves, it may happen, that others inſtructed by their Example will deſperately hold out to the laſt Extremity, rather than commit themſelves to the Power of a mercileſs Enemy; and all Victors ſhould conſider, that tho' the Glory of Arms be great in the Conqueſt of Enemies, yet to ſhew *Mercy*, *Kindneſs*, and *Moderation*, and to aſſwage and repreſs Anger and Revenge, is not only Generous, but *God-like*.

CHAP

CHAP. XI.

Of AMNESTIES, *and the Benefit thereof to a State.*

ALL wiſe States have ever thought it the beſt Rule of Policy, to put an End to Inteſtine Commotions by the eaſieſt and gentleſt Method; and therefore, in the Beginning of Rebellions, wiſe Governours have thought it moſt prudent to iſſue Proclamations for Rebels to lay down their Arms, and *ſubmit to Mercy*: For a King is the Father of his Country, and conſiders, that the Loſs of every Subject, is the Damage of his Kingdom; and the Fate of War being uncertain, 'tis moſt ſafe to heal the Diſeaſe before it arrives at too great a Head; and nothing but Neceſſity ſhould force any wiſe Prince to reduce Rebels by force: For whatever the Event be, the King is ſure to ſuffer the Loſs of ſome of his beſt Subjects.

And if any Grievances have exaſperated the Subjects to take recourſe to Arms, 'tis uſual to promiſe a Redreſs of any Hardſhips they lie under: For Princes, hearing with other

other People's Ears, and ſeeing with other People's Eyes, are very often ignorant of the Hardſhips which their People ſuffer by Means of thoſe *Sycophants*, who ſtop all Avenues to the Prince; and it often happens, that a Prince's Eyes are not open'd to ſee the Calamities of his Subjects, 'till this deſperate Remedy brings the unwelcome News. Then a good Prince will not diſdain to be inform'd of the Miſmanagements of thoſe, who by Flatteries and Siniſter Arts have encompaſs'd his Perſon, and engroſs'd his Favours; and will condeſcend to liſten to thoſe Complaints and Sufferings, which have enforced a Dutiful and Loyal People to have recourſe to Arms, contrary to the Duty of Allegiance, and contrary to their own Good Will and Affection to the Prince: For there are few Princes ſo ungracious as to be hated for their own Perſonal bad Qualities; but moſt Princes, who have ever proved diſtaſteful to their People, have been ſo on Account of thoſe evil Miniſters, who, in the Name and by Authority of the Prince, have vex'd and oppreſs'd the People: Therefore when Princes have been truly apprized of the real Motives of Rebellion, they have not only vouchſafed to Treat with the Male-contents, and redreſs

their

their Grievances, but have diſcarded their evil Favourites, and advanced thoſe, whom they before deem'd REBELS, to Places of Truſt and Preferment, with the Grant of a free and full Pardon.

And the odious Name of REBEL being laid aſide, they have thought fit to Treat with them as Male-contents; of which we have had a late Inſtance between the Emperor and his Rebel-ſubjects of *Hungary*. Our own Hiſtories and Records do furniſh us with plentiful Inſtances of the like Nature; whereof the Records of Treaties between our King *Edward* II. and the *Contrarients*, ſtill preſerved in the Tower, are a manifeſt Proof.

By theſe Methods Princes have not only ſecured their own peaceable Poſſeſſion of the Throne, but have wonderfully endear'd thoſe who were before alienated from them; and have had no Male-contents but their old diſcarded Courtiers and Favourites.

Even Tyrants and Bloody-minded Princes have, by their Taciturnity and Gentleneſs on ſome particular Occaſions, overcome the Hatred of their Subjects; of which the Hiſtory of *Saul* yields a notable Example. That Prince was advanced to the Throne by the Appointment of God himſelf, yet ſuch was the Perverſe-

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neſs of his Subjects, that they refuſed to recognize him on his Elevation, and to make their Addreſſes of Duty and Homage; chiefly becauſe he had been choſen out of one of the ſmalleſt Families of the Tribe of *Benjamin*, which ſome Years before had rebelled againſt the Republic: But *Saul*, ſlighting the Affront, had ſoon after an Opportunity of revenging the Indignity; and ſome of his Courtiers would have perſuaded him to execute Vengeance on the Malefactors: But he meekly anſwer'd, *There ſhall not a Man be put to Death*; which no doubt did wonderfully ingratiate him with the People. Yet this very King was in his own Nature a cruel and bloody Prince; for his Reign was ſo atrocious, that God Almighty inflicted a heavy Judgment on his Country, many Years after his Death, and gave for reaſon, that 'twas *for* Saul *and his bloody Houſe*, in the Maſſacre of the *Gibeonites*: And his own Subjects did no leſs feel the Weight of his cruel Paſſion; for out of revenge to one *High-Prieſt*, who had ſhewn an Act of Charity and Compaſſion to his *deſign'd Succeſſor*, he attempted to overthrow the *Jewiſh* Church by the Slaughter of a whole City of Prieſts.

1 *Sam.* xi. 13.

But

But the Wiſdom of a good Prince is better ſhewn in the Example of *David*; who being forced from his Capital by the unnatural Rebellion of his Son *Abſalom*, immediately after his Victory proclaim'd a general Amneſty: And when he was preſs'd by a Sycophant Courtier to put but one Arch-Rebel to Death (who proſtrated himſelf at his Royal Feet, and ſubmitted to the *King's Mercy)* he refuſed the Advice with Indignation; ſaying, *What have I to do with you, ye Sons of* Zeruiah, *that ye ſhould this Day be Adverſaries unto me? Shall there any Man be put to Death this Day in* Iſrael? *For do not I know that I am this Day King over* Iſrael? A God-like Temper; fit to be follow'd by Princes of all Nations.

2 *Sam.* xix. 22.

Thoſe who are acquainted with the *Greek* and *Roman* Story do know, that they were very tender of the Blood of Citizens, and uſed all endeavours to eſtabliſh their Government upon the Foundations of Mercy and Lenity. When a Party of the *Athenians* had offended againſt the *Democratical* Conſtitution of their Country, and inſtead thereof, had ſet up a *Lacedemonian* Tyranny, *Thraſybulus*, who had deliver'd his Country from that Uſurpation, took care to eſtabliſh ſo

Cor. Nepos, in ejus vita.

ſo general a Pardon, that the Country was wholly freed from any Apprehenſion of Puniſhment for paſt Offences; and he paſs'd a Law, that no remembrance ſhould be had of former Miſcarriages; which Law was call'd *An Act of* OBLIVION; and he took care to ſee it executed and confirm'd by the Oaths both of Magiſtrates and People: And none were proſcribed with the Thirty Tyrants (who had uſurped the Government and tyranniz'd over a free State) but the Ten *Prætors* who had aided and abetted the Uſurpation; *Tyranni, ut pacis Victimæ, trucidantur.*

A like Law paſs'd here in *England* at the Happy Reſtauration of *Car.* II. after a Rebellion of twenty Years continuance; wherein were excepted only thoſe who had imbrued their Hands in the Blood of the King's Father (the Royal Martyr;) and even of thoſe Regicides, Nineteen, who *Surrendred* upon the King's Proclamation and ſubmitted to his *Mercy* (or rather ſurrendred to *Juſtice*) had their Lives ſpared: And there is a Clauſe in that Act, that in regard the following Perſons, viz. '*Owen Row, Auguſtin Garland, Edmund Harvey, Henry Smith, Henry Martin*, Sir *Hardreſs Waller, Robert Titchbourn, George Fleetwood, James Temple,* '*Thomas* 12 *Car.* 2. cap. 11.

'*Thomas Wait*, *Simon Meyn*, *William* '*Heveningham*, *Iſaac Pennington*, *Peter* '*Temple*, *Robert Lilburn*, *Gilbert Milling-* '*ton*, *Vincent Potter*, *Thomas Wogan*, and '*John Downs*, had perſonally appear'd and 'rendred themſelves, (according to the Pro- 'clamation bearing date the 6th of *June* '1660, to ſummon the Perſons therein 'named, who gave Judgment, and aſſiſted 'in the ſaid horrid and deteſtable Murther 'of our ſaid late Sovereign, to appear and 'render themſelves) and did pretend thereby 'to ſome Favour, upon *ſome conceived* '*doubtful Words* in the ſaid Proclamation;' therefore the King and his Parliament were ſo tender of the *Public Faith*, that the Execution of thoſe Traitors was reſpited, unleſs an Act ſhould paſs for that Purpoſe.

This is agreeable to the Oath that every *Engliſh* King takes at his Coronation, to *execute the Laws with Mercy*; For we have a Maxim in our Law, that *ſummum Jus eſt ſumma Injuria:* And if Kings ſhould execute Juſtice with Rigor, their whole Reign would be a ſcene of Cruelty; for, as my Lord *Coke* ſays, there is *no Man but offends God and the King.*

The *Romans* not only enlarged their Empire by their Gentleneſs to Captives taken in War, and their Humanity to a Conquer'd

quer'd People, but very much ſtrengthned their Government by their Lenity to their Fellow-Citizens taken in Rebellion; for they conſider'd, that Blood drawn from the Body Politic, like that drawn from the Natural Body, muſt endanger and weaken its Conſtitution: Of which the Example of the *Dedititii*, beforemention'd, may ſerve as a full Proof.

But, to return to our own Country; *Henry* VII. was a wiſe and politic Prince: And tho' he liked well to fill his Coffers by the Crimes and *Forfeitures* of his People; yet in Rebellions he thought it the wiſeſt Courſe, to proclaim his Pardons immediately after he had ſubdued the Rebels. This he did after three Inſurrections which attacked his Title to the Crown; and at laſt his Lenity overcame their Obſtinacy.

Henry VIII. was not leſs Politic in proclaiming Pardon and Peace to the *Pilgrims* (ſo call'd:) For, a great Number of Gentlemen having Aſſociated for Redreſs of Grievances, chiefly upon the Change of Religion, wherein People are naturally apt to be ſway'd by the Byaſs and Prejudices of Education; the King, underſtanding that they were making an Expedition, or Pilgrimage, to *London*, with an armed Force, without committing any Acts of Hoſtility,

Hoſtility, or Damage to his People, ſent them a kind and loving, (I may ſay *Fatherly*) Meſſage; that if they would diſperſe, their Grievances ſhould be all redreſs'd, and their Perſons received to Favour; upon which, they all ſubmitted to the King's *Mercy*.

If I may preſume to offer a Reaſon for ſuch Lenity and Indulgence of Princes, I can find no better than this; that the Thrones of Princes have their Foundation, like the Throne of God, in *Mercy* and *Juſtice*: But, even in the Throne of God, the Seat of MERCY is the chief Seat; which he has been pleaſed to ſignify to us, in the Pattern he gave to the *Jews*, when he commanded the *Ark* to be made according to the *Heavenly Pattern*, ſhewn to *Moſes*; where the *Mercy-Seat* obtain'd the Chief Place.

The Laws of *England* are framed (as near as Human Laws can be) according to the Laws of God; and, the Lord *Coke* ſays, they are ſo contrived, that they rather ſuffer Guilty Perſons to eſcape, than to intrap one Innocent Perſon in Life or Fortune: Which agrees with what the Lord Chancellor *Forteſcue* (one of whoſe Deſcendants, has made fair Advances to the ſame Poſt of Honour,) has deliver'd before him in

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these Words, *Indeed I could rather wish twenty Evil doers to escape Death, thro' Pity, than one Man to be unjustly condemn'd.* And 'tis certain, that those Laws which are establish'd upon Rules of *Mercy* do most conduce to the Benefit of the State. De laud. Leg. Angl.

Some Persons, who think themselves great Politicians, have set down Rules and Maxims for the governing a Kingdom by *Parties*; and it seems to have been the prevailing Maxim for an Hundred Years last past: But the Consequences have shewn the Falsity of such a Reason in Politics: For all Factions and Parties, are so many Divisions within a Kingdom; and we know who has told us, that a *Kingdom divided against it self, cannot stand*: And even the Kingdom of *Discord* is kept up by a Sort of Unity. Therefore 'tis certainly the wisest Method for all Governours, rather to heal and compose Divisions, and make such Laws as may abolish all Cause of Disputes, and Divisions among Citizens of the same Kingdom, and prevent and cut off the remembrance of Injuries from the Magistrates to the People, and from the People to the Magistrates. Before the Prince of *Orange* took upon him the Crown of these Kingdoms, he was instructed

ſtructed by Sir *George Treby*, in ſome wiſe Rules, for the Direction of his Adminiſtration; which were, at firſt, partly the Meaſure of his Government: But, becauſe a contrary Method has been ſince taken, I ſhall forbear to mention them.

I might here ſuggeſt ſome proper Rules and Directions, that have occured to me, for the orderly Government of a State, particularly adapted to the Conſtitution of *England*, and allaying that ſpirit of Faction and Diſcontent that ſo much prevails: But ſuch, from an Obſcure Writer, will be receiv'd, like *Caſſandra*'s Prophecies, rather with Indignation and Diſdain, than according to the good Will and Intention wherewith 'tis offer'd.

But this I will venture to lay down as a *certain Principle*, that whatever Method is taken for healing, or rather ſuppreſſing, of Parties, will be of no Avail, if it has not its Foundation in the Laws of *God*, and Principles of *Chriſtianity*; and whoever ſhall undertake That,

Benedicat Deus Operi & faventibus!

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F I N I S.

ERRATA.

PAGE xxii. Line 27. instead of *had*, read *has*: p. 5. l. 10. instead of *commit*, read *permit*; p. 15. l. 24. instead of *where*, read *were*. p. 59. l. 11. instead of *Inniſking*, read *Inniſkillin*.

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